No. 83-5424

In the Supreme Court of the United States

OCTOBER TERM, 1983

GLEN BURTON AKE, PETITIONER

v.

STATE OF OKLAHOMA, RESPONDENT

ON WRIT OF CERTIORARI TO THE OKLAHOMA CIRCUIT COURT OF CRIMINAL APPEALS

JOINT APPENDIX

DAVID W. LEE
Assistant Attorney General
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921
Counsel for Respondent

ARTHUR B. SPITZER
American Civil Liberties Union Fund
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Counsel for Petitioner

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1983
CERTIORARI GRANTED MARCH 19, 1984

55 pp

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DISTRICT COURT FOR
CANADIAN COUNTY, OKLAHOMA

RELEVANT DOCKET ENTRIES

Date	*Description*
10-17-78	Information Filed
10-17-79	Warrant Issued (Glen Burton Ake a/k/a Jonny Vandenover)
11-23-79	* * * This is the initial arraignment of both Defendants. Information read, advised of rights. Defendnats [sic] state they are unable to hire their own attorneys. The Court at this time appoints the Public Defender to represent the Defendants. Bonds denied. * * * Each Defendant enters a plea of Not Guilty. * * *
1-15-80	Amended Information filed
1-17-80	* * * The Defendants appear for arraignment on the Amended Information. * * * The Defendants are provided with copies of the Information. Their rights are fully explained at this stage of the proceeding. The attorney for each Defendant announces that they waive the reading of the information and they enter a pleas of Not Guilty. Each Defendant has indicated that he understands the nature of the charge. The Court, after hearing the matter, denies bond and the Preliminary hearing is scheduled for January 21, 1980 at 9:00 a.m. before Judge Bednar. Judge Bednar.
1-21-80	Matter comes on for Preliminary hearing this date. * * * Court finds there is probable cause to believe that the crime of Murder in the First Degree was committed on or about Otober 15, 1979 * * *. The Defendants are bound over to the Trial Division of the District Court. * * *
2-14-80	* * * Case comes on for arraignment in the Trial Division. * * * Upon statement of coun-

sel, Defendant elects to remain mute as to entry of plea * * * and the Court enters a plea on behalf of the Defendant of Not Guilty reserving the right to withdraw the plea for purpose of motions. Defense counsel specifically do not desire the particular plea of Not Guilty by Reason of Temporary Insanity to be entered * * *

2-20-80 It having come to the attention of the Court that in addition to the interruption at arraignment created by this Defendant, there have been other incidents of bizarre behavior at the jail and because of other information related to the Court by others, it appears that this behavior may very well be staged for the benefit of the Court, but the Court desires the assistance and advise [sic] of expert medical help. In view of the record made at arraignment by counsel for Defendant-Ake as to his present state of mind, the Court hereby Orders that Dr. William Allen see the Defendant at his jail cell on Friday, February 22, 1980 at 8:00 a.m. for the purpose of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation, as provided by the statutes of the State of Oklahoma. Judge Martin.

3-5-80 Copy of letter from William L. Allan, M.D. regarding Glen Ake filed.

3-5-80 Order of committment [sic] for observation issued to Canadian County Sheriff (Glen Burton Ake)

3-5-80 The Defendant ordered transported for temporary observation of present sanity. Judge Martin.

4-7-80 Copy of letter from Eastern State Hospital filed.

[4-10-80]* [Civil Mental Health Hearing held; Court finds Ake mentally ill and in need of care and treatment]

5-1-80 Copy of letter to Judge Martin from R. D. Garcia, M.D. Chief Forensic Psychiatrist, Eastern State Hospital filed

5-27-80 * * * The Court having been notified by Eastern State Hospital at Vinita, Oklahoma, that the Defendant has recovered sufficiently, and that he is mentally competent to stand trial. The Court Orders the proceedings herein reinstated. Judge Martin.

6-2-80 It appearing to the Court that proceedings herein have been reinstated, the case is set for Pre-Trial Conference on June 13, 1980, at 1:30 p.m. and set for Trial on the Merits on June 23, 1980, at 9:00 a.m. Judge Martin.

6-13-80 * * * Defendant appears by Jim Brewer and Richard Strubhar, but not in person. Comes on for Pre-Trial conference.

* * *

Defendant's Motion for Production of Transcript of Mental Hearing is sustained. The Court Reporter is directed to prepare the transcript at State expense.

Defendant's Demand for Production of Psychiatric Evaluation is overruled upon representation of the State it has no Report of any nature.

Defendant's Motion to Have Psychiatrist Evaluate the Defendant at Court expense is overruled. The Court Orders that the Defendant be made available by the Authorities for examina-

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*This proceeding was held in a separate matter, Docket No. PMH 80-8, and is not reflected in the Docket Entries of the criminal case. The transcript of this hearing was admitted into evidence at the trial. *See* Tr. 607-08.

tion at the Defendant's expense, in the event he is able to raise the necessary funds.

Defendant granted permission to file written Motion to Remand for Separate Jury Trial on Present Mental Competency and Motion to Have Psychiatrist Evaluate. The Defendant's motion for Separate Jury Trial on Present Sanity is argued at this time, but Defendant suggests that he will have additional matters to present in that regard just prior to Trial. This issue will be settled immediately prior to Trial.

* * *

6-26-80 The Jury, after due deliberation in the first stage of the Trial, renders the following verdict: We, the Jury, empaneled and sworn to try the issues of the above title [sic] cause, upon our oath, find the Defendant, Glen Burton Ake, Guilty of the crime of MURDER IN THE FIRST DEGREE. Court accepts the verdict, and approves the same. Judge Bednar.

6-26-80 The Jury, while deliberating in the second stage of the Trial, returns the verdict, showing with respect to the Statutory Aggravating Circumstances, as follows (1) The murder was especially heinous, atrocious, and cruel. (2) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. (3) They found existence of probability that the Defendant would commit criminal acts of violance [sic] that would constitute a continuing threat to society. The Jury, having completed that verdict form, entered its verdict of Guilty of the Murder and the Crime in the First Degree and fixed the Defendant's punishment at DEATH. The Court accepts the verdict form, the Jury is polled, each Juror individually indicates that they found the three circumstances to be true and that they had accessed [sic] the punishment at death. Judge Bednar.

6-26-80 The Court set the sentencing date to be July 25, 1980, at 9:00 a.m. The Defense attorneys were informed they had two weeks to file any motions which they may have from this date. The Court denies any bond. Judge Bednar.

7-25-80 Motion for New Trial filed

7-25-80 The Matter comes on for Judgment and Sentencing this date. * * * The Defendant presents a Motion for New Trial. The Motion for New Trial overruled. The Court enters its Judgment overruling the Motion for New Trial. The Court, finds there is no legal cause shown why Judgment and Sentence should not be pronounced against the Defendant. In conformity with the verdict of the Jury, the Court enters its Order sentencing the Defendant to punishment by DEATH for the offense of MURDER IN THE FIRST DEGREE in conformity with the verdict of the Jury. The Date of Death to be October 10, 1980. Judge Bednar.

7-25-80 The Court this day issues the Death Warrant of the Defendant, as per Warrant. Judge Bednar.

7-25-80 Notice of Appeal filed

7-25-80 Order Appointing Appellate Public Defender filed and recorded.

COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

CHRONOLOGY OF PROCEEDINGS

Date	*Proceedings*
2-2-81	Petition in Error filed.
6-2-82	Oral argument held.
4-12-83	Opinion and Judgment filed. Convictions and sentences affirmed.
5-2-83	Petition for Rehearing filed.
6-15-83	Petition for Rehearing denied.

LETTER OF WILLIAM L. ALLAN, M.D.
(FEBRUARY 26, 1980)
[FILED IN THE DISTRICT COURT]
[SEE DOCKET ENTRY OF MARCH 5, 1980]

William L. Allan, M.D.
5317 N.W. 114th
Oklahoma City, Oklahoma 73132

February 26, 1980

Judge Martin
Canadian County Court
El Reno, Oklahoma

Dear Judge Martin,

I saw Glen Ake in psychiatric evaluation in order to determine his competency to stand trial.

In my judgment it is not possible to determine on the basis of one or two interviews whether Mr. Ake is indeed competent to stand trial. He did act in a bizarre fashion but it is not clear to me whether this represents a true psychotic picture or whether he is acting in order to convince others of his psychosis. It should be possible to determine this issue with a more prolonged sixty day observation period.

Mr. Ake is a danger and it is important that such sixty day psychiatric observation be done in a setting with sufficient security to control him.

With best wishes.

Very Truly Yours

/s/ William L. Allan, M.D.
WILLIAM L. ALLAN, M.D.

WLA:OF

Incl: Psychiatric Evaluation

PSYCHIATRIC EVALUATION

AKE, Mr. Glen Burton
Date: February 22, 1980
D.O.B.: September 8, 1955

Glen is a large extremely muscular white male who presents himself in an odd fashion. He initially refused to speak with me, stared in an angry manner, but gradually would talk about himself in relation to his study of the Bible. There are no apparent speech defects. The predominant affect or mood was that of anger and at times he would flare into marked anger. The man is obsessed now with the Bible and is studying it intensively. He has, however, little formal academic skills and is somewhat limited in his intrepretation of the Bible. At times he appears to be frankly delusional about selected passages of the Old Testament. He claims to be the "sword of vengeance" of the Lord and that he will sit at the left hand of God in heaven (Jesus sits on the right hand). During this discussion of the Bible, at times he would lapse into obsenities.

On the issues pertinent to his competency to stand trial, Mr. Ake is apparently delusional. It should be stressed that it is not clear from this clinical interview whether he is indeed psychotic about this or if he is malingering. Mr.Ake said that there was no need to pray for forgiveness. He acknowledged that he had been in Court and stated that Judge Martin is an agent of the Devil and hence had no authority over him. He stated that everyone connected with the Court and jail are sinners. In contrast, however, he nodded in acknowledgment as to the charges of murder in the first degree and he stated that his lawyers, Mr. Brewer and Mr. Strumbaer, are his friends, and that they are Christians. He stated at one point that he would cooperate with them and on the second occasion he stated that he would not talk to them. At that point he appeared to be extremely angry with the examiner about this line of questions.

Mr Ake spoke a great deal about the barrenness of this land and of the upcoming cleansing of fire by God. He associated to his difficulties with his family. He stated that his

mother and, more so, his father would be punished for their sins. He acknowledged that there is a nephew who is too young to sin and hence will not be punished. Mr. Ake stated that he had first spoken directly to Jesus at seven years of age after his father had hit him severely for smoking his first cigarette.

Diagnostic Impression: (1) Probable paranoid schizophrenia. (2) Conscious malingering or play acting of this material cannot be ruled out during brief psychiatric evaluation at this time.

This is one case in which a more prolonged psychiatric evaluation is necessary in order to determine the man's competency to stand trial, understanding of the charges against him, and ability to cooperate with counsel.

/s/ William L. Allan, M.D.

WILLIAM L. ALLAN, M.D.

LETTER OF R. D. GARCIA, M.D.
(APRIL 1, 1980)
[FILED IN THE DISTRICT COURT]
[DEFENDANT'S EXHIBIT 1; ADMITTED INTO EVIDENCE, TR. 608]

EASTERN STATE HOSPITAL
VINITA, OKLAHOMA
74301

1 April 1980

Re: AKE, Glen Burton #32391
Your Case Nos. CRF 70-302, 303, 304 & 305

Dear Judge Martin:

The above-named was admitted to this hospital by your order for a period of observation not to exceed April 10, 1980, on March 6, 1980. Criminal charges are pending.

We have completed our evaluation of Mr. Ake and it is the opinion of our staff that he does not have sufficient ability to consult with an attorney and he does not have a rational or actual understanding of the proceedings pending against him. Since Canadian County is not in our catchment area we would recommend that court action be taken to have him committed to Central State Hospital at Norman, Oklahoma for care and treatment.

Please remove him from this hospital at your earliest convenience.

Respectfully,

/s/ R. D. Garcia, M.D.

R. D. GARCIA, M.D.
Chief Forensic Psychiatrist

RDG:ml

cc: District Attorney, Canadian County, ElReno, Oklahoma
County Sheriff, Canadian County, ElReno, Oklahoma

IN THE DISTRICT COURT IN AND FOR
CANADIAN COUNTY, STATE OF OKLAHOMA

EXCERPTS FROM TRANSCRIPT OF
MENTAL HEALTH HEARING
(APRIL 10, 1980)

[ADMITTED INTO EVIDENCE AT TRIAL, TR. 607-08]

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

GLEN BURTON AKE, A/K/A JOHNNY VANDENOVER,
DEFENDANT

PMH. No. 80-8

CRF-79-302
CRF-79-303
CRF-79-304
CRF-79-305

IN RE: THE MENTAL HEALTH OF
GLEN BURTON AKE, a/k/a JOHNNY VANDENOVER
APRIL 10, 1980
BEFORE THE HONORABLE JUDGE FLOYD MARTIN

* * *

[TESTIMONY OF WILLIAM L. ALLEN, M.D.]

[p. 17] Q. [by the Court] Doctor, based upon your total contact with Mr. Ake, based upon all of your examination of the records available to you, and based upon your discussion with Dr. Garcia, do you have an opinion as to Mr. Ake's present mental competency?

A. Yes

Q. Would you please tell me what your opinion is?

A. I believe that he is a psychotic—uh—that his psychiatric diagnosis was that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis that he is dangerous.

* * *

[p. 18] Q. The statute requires, Doctor, that we explore the least appropriate restrictive treatment for his condition. Do you have an opinion about that?

A. Yes, I—I think that, because of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within—I believe—within the State Psychiatric Hospital System.

* * *

[p. 19] Q. [by Judge Martin] Doctor, the question has been posed, and it is an appropriate one for us to explore, although it is not the exact burden here, but do you have an opinion based on everything available to you as to whether or not Mr. Ake at this time would have the ability to communicate with his attorneys and assist them in any defense or any criminal felony matters that are pending?

A. I have—uh—less certainty as to the answer to the competency or evidence for competency to stand trial. As you know I saw him for that particular purpose in February, and at that time, asked him questions directly concerning that; that he know what the charges were against [p. 20] him and could he cooperate with counsel.

I was not sure at that time so I referred him for inpatient observation and that evidence has been offered by Dr. Garcia, saying essentially, that he was not competent to stand trial. Now, today, in referring to his attorney, Mr. Brewer, he said that he too—that Mr. Brewer too—I believe, was an agent of the devil, whereas, previously he said—previously, Mr. Ake had said Mr. Brewer was a Christian and, hence, his friend, and able to represent him.

But, I think that what the psychiatrists can say in a more general way is that Mr. Ake is extremely delusional, uncooperative, and so, just without addressing questions to him directly on that issue, the general impression would be that he's not able to cooperate.

Q. All right.

A. But, I did not, in the limited examination that we could do here—I certainly did not address that issue.

Q. I notice that the report of at least one person here seems to indicate that Mr. Ake was not responsive to questioning here this morning?

A. That's right.

Q. Can you tell me a little bit about your experience in that regard during your examination before the Court came into the Courtroom.

What was your impression about his responsiveness [p. 21] or lack thereof?

A. Well, he was extremely unresponsive, did not wish to answer question[s], and, in fact, did not answer many questions, so that I, in turn after conferring with the attorney, didn't ask him some of the routine questions about family, etcetera, that are on the commitment form.

Mr. Ake's justification for not answering is to quote scripture and say, essentially, that he doesn't have to, that we are not of the same dimension—I believe "lofty dimension", that he is, and therefore, we cannot understand him—him and his truth. So, it was extremely difficult to do the usual sort of clinical psychiatric essentially because he wouldn't answer and he appeared to be quite angry when we did ask him questions.

Q. All right. Doctor, I don't know whether you have an opinion on this—but, do you have an opinion as to whether or not Mr. Ake at this time understands the significance or the difference between right and wrong?

A. At this time?

Q. At this time?

A. (Mumbles) I have to give a qualified opinion because— uh—all of his statements are coached [sic] in terms of his religious beliefs which are delusional and his concept of right and wrong does not accept the Court's authority of government.

[p. 22]

Q. I see.

A. So, he just doesn't accept what the rest of us live by.

Q. So, I'm having to interpret a little . . .

A. Sure.

Q. (Continuing) . . . but do I interpret your answer to say that in terms of society's judgment as between right and

wrong, whatever things he may have are not on that level but are somewhat different?

A. Yes. Hs word [sic] would be a different dimension. He does not, as I understand it accept the ordinary rules of right and wrong.

THE COURT: Mr. Goerke, do you think that sufficiently covers it?

MR. GOERKE: Yes, sir.

THE COURT: Thank you.

You may step down, Doctor. Thank you very much.

* * *

[p. 28] THE COURT: Mr. Ake, I have not tried to address you before. I wanted to hear the evidence from others.

Can you hear me from where you are seated and you need not move up here?

MR.AKE: Huh?

THE COURT: Can you hear me, Mr. Ake?

MR. AKE: Yeah.

THE COURT: All right. I wondered if you have any comment that you would care to make about these proceedings that have gone on or if you have talked to the lawyers at all about what you would like to have done at this time?

MR. AKE: No. You're the head of them.

THE COURT: All right.

Are you aware that you have refused to answer some questions that Mr. Lewis and Mr. Brewer asked you earlier this morning?

MR. AKE: I won't answer nobody's questions. They're all the same

THE COURT:;All right.

The doctors indicated to me that you have refused to talk with them also. Are you aware that you have refused to talk with them?

[p. 25]

MR. AKE: Everybody's the same.

THE COURT: I see. All right.

MR. AKE: All right.

It is the finding and order of this Court that Glen Buron Ake is a mentally ill person in need of care and treatment as defined in Title 34A O.S. § 3 of the laws of Oklahoma.

The Court has prepared now and will now execute an order of admission * * *.

LETTER OF R. D. GARCIA, M.D.
(MAY 22, 1980)
[DEFENDANT'S EXHIBIT 2; ADMITTED INTO EVIDENCE, TR. 608]

EASTERN STATE HOSPITAL
VINITA, OKLAHOMA
74301

22 May '80

The Honorable Floyd L. Martin
Judge of the District Court
In and For Canadian County
ElReno, Oklahoma 73036

Re: AKE, Glenn Burton #32391
Your Case No. PMH 80-8

Dear Judge Martn:

The above-named was admitted to this hospital by your order for care and treatment on April 10, 180. Criminal charges are pending against him.

As a result of a recent evaluation it is the opinion of our staff that Me. Ake has improved to where he would be able to adequately consult with an attorney and he does have a rational as well as actual understanding of the proceedings pending against him. He is being maintained on the following medication: Thorazine 200 mgms. t.i.d. We would of course recommend that he continue this medication in order for his condition to remain stabilized.

We would further recommend that he be returned to the jurisdiction of your court and we would appreciate your removing him from this hospital at your earliest convenience.

Respectfully,

/s/ R. D. Garcia, MD

R. D. GARCIA, M.D.
Chief Forensic Psychiatrist

RDG:ml

cc: District Attorney, Canadian County, ElReno, Oklahoma
County Sheriff, Canadian County, ElReno, Oklahoma

IN THE DISTRICT COURT FOR
CANADIAN COUNTY, OKLAHOMA

EXCERPTS FROM TRANSCRIPT OF
PRE-TRIAL CONFERENCE
(JUNE 13,1980)
[CAPTION OMITTED IN PRINTING]

[p. 19] THE COURT: * * * I am curious about something else that you haven't mentioned. If you intend to have a psychiatrist evaluate your client and you are court-appointed counsel . . .

MR. BREWER: [Counsel for defendant] That comes next, judge.

THE COURT: (Continued) . . . how—all right. How do you intend to pay for it?

MR. BREWER: That was phase two.

THE COURT: All right.

MR. BREWER: At this time, judge, in relationship to our motion, now—I'm sure the court is very well aware of the severity of the charge—the court appointed, and by statute, we are granted certain funds by law that if the court sees necessary or fit and proper, the court can award us money to prepare a proper defense. And, at this time I am going to ask the court to grant us a reasonable amount of funds in which to pay the psychiatrist with, due to the fact, one, that the court has already seen fit to incarcerate, or to send him for a mental evaluation, giving right to the court that there was a problem. And, at this point, defense counsel feels that Glen Ake, indigent, and the court appointed counsel; still, under the constitution is entitled to monies for a psychiatrist as if he were another Cullin Davis who had the money to pay for it. To deny . . .

THE COURT: Show me any statutory or case authority [p. 20] that the court even has the power to pay for it, much less any right, under . . .

MR. BREWER: Okay, sir. Under Title—excuse me, judge, I have got a lot of material here.

(The court complied.)

MR. JAMES: [Assistant District Attorney] Your Honor, while everybody's kind of looking here, I'm familiar—of course I didn't know the motion was going to be

here today— but I am familiar with some recent case law that says that they are not entitled to have additional doctors appointed, and, in truth, you have appointed a doctor to examine him. You appointed the doctor at Vinita to examine him. He is a professional person. He treated him as an independent source.

THE COURT: Yes. Well, Mr. Brewer argued that there was statutory provision for that, and I was not aware of it. I thought perhaps I could learn something.

MR. BREWER: Under Title 21 ...

THE COURT: Under 21?

MR. BREWER: (Continued) ... O.S. Supplement, 1978, 701.14 ...

THE COURT: 701.14.

MR. BREWER: (Continued) ... which goes to the appointment of counsel and compensation; if my memory serves me right, there is a paragraph in there or words that I can be afforded an attorney's fee and a reasonable amount for expenses.

(WHEREUPON, a discussion ensued off the record.)

[p. 21]

MR. BREWER: Judge, may I make one other statement at this point?

THE COURT: Go ahead.

MR. BREWER: It may solve a lot of problems. Mr. Strubhar and I are both in agreement that the court appointed a very qualified M.D., Dr. William L. Allen and the court—at the time when Dr. Allen was one of the doctors that declared him to be incompetent—the court could then instruct Dr. Allen to go back and review Glen Ake at this time. That would be sufficient for us.

(WHEREUPON, a discussion ensued off the record.)

THE COURT: Let me hand you the statute book that I have received from my library now and see if you can find what you had in mind.

MR. BREWER: I figured that—if the court please, I remember seeing it, judge—if the court please, I will have to, during this very short period of time—I told the court I will furnish the court with that, but it says; that, if I re-

member correctly, the courts said where a man is declared indigent and is appointed legal counsel, at that point in time—if the court please, is prima facie—the man does not have any money because he was appointed legal counsel. Thus, in order to properly give him the defense necessary, then when the court appointed legal counsel, the thing that stems from that would be a meager amount of funds to prepare for the case, other than [p. 22] just a meager attorneys' fee. The State has an unlimited budget and things of this nature.

THE COURT: Oh, my, thank you. Go ahead.

(The parties laughed.)

THE COURT: Exclamation point.

THE REPORTER: I got that.

MR. BREWER: In Florida numerous employees, plus very good friends of the Police Department and other agents that get things done that does not cost money for defendants, indigent defendants in jeopardy of losing their life, come before our judicial system. The court appoints a legal counsel and then, having declared him indigent, then the court, by their own declaring of indigency and appointing of legal counsel, has inferred meager funds for preparation because the judge couldn't possibly conceive that defense attorneys could just be appointed and coldly walk into a case and defend a Murder One without some kind of meager money or meager means and investigating monies.

To deny to this client the indigent, individual, funds for the preparations would be a miscarriage of justice, to even appoint even an attorney, if the court please, because an attorney has got to have, as the court knows, funds to properly defend his client. And, in a Murder One case, I hear the word "expense", and I cannot possibly believe that in anybody's heart a few meager dollars is going to stand between [p. 23] a man charged with Murder in the First Degree, of insuring him of a constitutional, fair and impartial trial, and being prepared because of a few dollars that they think might be spent of the taxpayers' money. Life, itself, is far too precious to consider any monetary value that might be expended within reason, and that is where the un-

derlying factor of expenses come when they appoint an attorney. It is automatically assumed that you will get some money . . .

THE COURT: Mr. Brewer, let me interrupt your statement a moment.

MR. BREWER: (Continued) . . . I have no more to say, judge. I will write you a little brief or something.

THE COURT: Do we agree that the statute you cited, at least by number, does not appear to grant that authority, as I read it?

MR. BREWER: Yes, sir, I will agree with that.

THE COURT: All right.

MR. BREWER: But, I will just inform the court that it is in my mind. I read the statute and operated under it five times. There is someplace where I am entitled to expenses because I remember getting expenses in a case for . . .

THE COURT: All right.

MR. BREWER: (Continued) . . . $16.50 for xerox copies I made and Judge Homer Smith signed the order and I haven't cited it to you, but I will find that case or whatever he used [p. 24] and bring it back to the court for your evaluation.

THE COURT: Let me state, before ruling upon your motion, I am not aware of any statutory authority in this case. I am aware of U.S. Supreme Court case in *U.S. Ex Rel. Smith v. Baldy*; 334 U.S. 561, 97 Law Ed. 549: 73 Sup. Ct. 391, in which the U.S. Supreme Court held that a State does not have a constitutional duty to provide private psychiatric examination to indigent defendants. Oklahoma has cited that U.S. Supreme Court case in two decisions, of which I am aware. In *Stedham v. State* at 507 P 2d. § 1310, and *Tims* v. *State* at 515 P 2d. § 1227, in both Stedhams and Tims, our Court of Criminal Appeals denied that right to defense counsel.

The further problem in regard to it is that the statutes and all of the rulings are, originally, very strict, and since then have become almost cripplingly restrictive, that courts may not— repeat, "not"—spend any court funds unless specifically authorized by statute. This has been more and more strictly construed against courts, and so unless I can

see some specific authority, I could not even consider it. The request for private psychiatric evaluation at the expense of the State is denied. You may have the defendant available, if you are able to arrange it, in some other manner.

IN THE DISTRICT COURT IN AND
FOR CANADIAN COUNTY
STATE OF OKLAHOMA

**[EXCERPTS FROM TRANSCRIPT OF TRIAL
(JUNE 23-26, 1980)]**

THE STATE OF OKLAHOMA, PLAINTIFF-IN-ERROR [sic],

vs.

GLEN BURTON AKE, A/K/A JOHNNY VANDENOVER, AND
STEVEN KEITH HATCH, A/K/A STEVE LISENBEE,
DEFENDANTS-IN-ERROR [sic].

No's. CRF-79-302
CRF-79-303
CRF-79-304
CRF-79-305

* * * * * *

**TRANSCRIPT OF PROCEEDINGS ON APPEAL [sic]
HAD FROM JUNE 23 THROUGH JUNE 26, 1980
BEFORE THE HONORABLE JAMES D. BEDNAR**

* * * * * *

APPEARANCES:

MR. EARL GOERKE, District Attorney; and MR. BILL JAMES, Assistant District Attorney, appearing on behalf of the State of Oklahoma.

MR. J. MALONE BREWER, Attorney at Law, Suite 214, 2000 Classen Boulevard, Oklahoma City, Oklahoma 73106, appearing on behalf of the Defendant Glen Burton Ake.

MR. RICHARD D. STRUBHAR, Attorney at Law, 403 West Vandament, Yukon, Oklahoma 73099, appearing on behalf of the Defendant Glen Burton Ake.

* * *

[PROCEEDINGS IN CHAMBERS]

[p. 3]

MR. BREWER: We are going to at this time withdraw our Motion for Sanity Trial to Determine Present Sanity on and for the following reasons: One, that he has just re-

turned from Vinita. The State's doctors have certified him competent to stand trial. We still raise the issue of sanity at the time the crime was committed, and the possibility of his sanity becoming rational and unrational from time-to-time, which we will inform the Court as this progresses. But, we feel as far as time, and as far as the time element involved we feel that at this time the testimony would primarily be that he was certified incompetent to stand trial by independent private practitioners. Sent to Vinita, and while at Vinita certified that he now was competent to stand trial. We do not at this [p. 4] time waive any rights as to his mental competency at the time the crime was committed.

THE COURT: So, the Motion for Jury Trial on Present Sanity is hereby withdrawn, is that correct?

MR. BREWER: Yes. Is that agreeable with you, Mr. Strubhar?

MR. STRUBHAR: Yes

(Court is recessed.)

* * *

[p. 411]

[STIPULATION READ BY THE COURT]:

That if Larry Fallon were called to testify, he would testify that he is a jailer at the Moffat County Jail, Craig, Colorado. That on November 21, 1979, at approximately 1136 hours, upon booking Glen Burton Ake in jail, he discovered one Visa card, number 4646-933-431-849. The account number expiring December 1979, belonging to one Marilyn S. Douglass. That it was found in the right rear pocket of Glen Burton Ake. That the said Larry Fallon would testify that on November 21, 1979, at approximately 1136 hours, he turned said card over to James E. Curtis, Detective, for the Moffat County Sheriff's Office.

* * *

[p. 456]

[TESTIMONY OF VIRGINIA KEEFE]

A Steven, and Glen, and I. And, on the third day, he had taken his wife to work—the friend had, and while he was gone they had taken the pendant. And, then they had

told me about some jewelry that they had, and they gave me some to wear. And, they said that it belonged to some people in Oklahoma that they had killed.

Q Who said that?

A Glen did.

Q Did they, in fact, show you some jewelry?

A Yes, sir, they let me wear some of it.

* * *

[p. 457]

Q All right. Prior to leaving the house, were there any telephone calls made?

A Yes, sir, Glen called his sister, and she had said that two of the—the two kids had lived, and Glen was scared.

Q How do you—

A They just wanted to—

Q How do you know that that's what the sister said?

[p. 458]

A Glen told us—Steve and I.

* * *

[p. 466]

[PROCEEDINGS IN CHAMBERS]

MR. GOERKE: * * * We are not going to have any defense of [p. 467] temporary insanity, because there is not going to be any evidence of it at the time. We just as well discuss that now too.

MR. JAMES: Yes, sir.

MR. GOERKE: No evidence of it.

THE COURT: You are going to have a doctor testify, or we are not going to do it on letters, I hope?

MR. BREWER: No, no, no, no.

THE COURT: Well, I cannot find—there is a reason for that—

MR. BREWER: We are going to have doctors to cover every—every doctor that has evaluated Glen Ake will testify.

THE COURT: Okay. Now, they will be ready to go in the morning, is that correct?

MR. STRUBHAR: Well, we are going to atempt to line them up.

THE COURT: Okay. We will be ready to go.

MR. STRUBHAR: One doctor is out of—he is in Arkansas, but he is supposedly coming in tonight.

MR. BREWER: Who is that?

MR. JAMES: Enos?

MR. STRUBHAR: Yeah.

MR. GOERKE: Well, they are going to be prepared to testify that they have examined, and that they have an opinion as to his mental capacity at the time the crime was committed, [p. 468] is that what you are saying?

MR. BREWER: That they can express—they didn't examine him at that time.

MR. GOERKE: They are going to now—between now and the morning?

MR. BREWER: No, they didn't examine him at the time of the crime.

MR. GOERKE: No one does. They evaluate them—

MR. BREWER: That's right. The theory of paranoid schizophrenia is a long lasting type situation. If some three months after, and due to the nature of the crime, and things that have occurred in the case, the psychiatrist can tell whether or not, in his professional opinion, he feels like at the time of the crime he was a paranoid schizophrenic, and knew the difference between right and wrong.

MR. GOERKE: I question that, but I see what you are doing.

MR. BREWER: I question it too, but nonetheless—

MR. GOERKE: No, I question even that they would base their opinion on that. I think they would have to have an MPI, and a tree/person/house, and a number of tests—physiological tests, psychological tests, psychiatric tests.

MR. BREWER: He was sent down to Norman, for testing, by the State. And, they sent him down there and they say that he is incompetent, and turn right back around and—

[p. 469]

MR. GOERKE: But, they, are not saying he didn't know right from wrong at the time of the crime, is what I am talking about now. There is a distinction.

MR. BREWER: Oh, sure.

MR. GOERKE: He could be paranoid schizophrenic and still know right from wrong.

MR. BREWER: Now, Judge, here is a question which I want the record to reflect, that Glen Ake has not spoken to me, or to Mr. Strubhar at any time during this trial. That the letter of April 1st, says that he is incompetent to stand trial. A letter of May 22nd, states that he is being maintained on the following medication: 200 milligrams TID, with the Court's recommend he continue this medication in order for his condition to remain stable. Now, at that point in time, he has a mental dysfunction that they control by the use of the tranquilizers. And, there are being questions that arise that while he takes this tranquilizer, he becomes a zombie. And, at this point he is totally and completely incoherent, should I say, and unable to—or, unable, or unwilling, or just flat can't communicate, or does not have the desire to communicate with either defense counsel.

* * *

[p. 502]

THE COURT: All right. Let's—are we ready to go to he jury?

MR. BREWER: Well, I just got my coffee, Judge. We have got one other thing to talk about.

MR. JAMES: I think there is a question—are you all raising any objection to the Jackson vs. Deno hearing?

MR. STRUBHAR: What is that?

MR. JAMES: To determine the other—

[p. 503]

MR. BREWER: I've never done a mental hearing in my life.

MR. JAMES: Nothing to do with mental.

THE COURT: In camera hearing.

MR. BREWER: Jackson vs. Deno, is that it is time that you are entitled to an in camera hearing to determine the

voluntariness, and whether or not Miranda was given, and Miranda was followed, and Miranda was properly waived.

MR. JAMES: Whether or not we would present evidence to show that he was advised of his rights.

MR. BREWER: I think we ought to.

THE COURT: Okay. Get your witnesses.

MR. JAMES: Do you want to do it with your defendant here?

MR. BREWER: We waive presence of our—he ain't going to talk to us anyway. He doesn't know what is going on. He is goofier than hell. We don't need him, and he can't assist us. We have already told the Court that he doesn't possess the ability to aid and assist in a jury trial. Has he ever talked to you, Mr. Strubhar?

MR. STRUBHAR: No.

MR. BREWER: He has never even talked to me. Never said hello.

* * *

[p. 506]

[TESTIMONY OF LUANN RAMMING (IN CHAMBERS)]

Q Did you have an occasion to have a conversation with him at approximately those hours?

A Yes, I did.

Q What was that conversation?

A He asked me if I would call the Sheriff and the OSBI for him.

Q Did you do that?

A Yes, I did.

Q Did you have a conversation with them?

A I called Sheriff Stedman.

Q As a result of the conversation with Sheriff Stedman, did you have further conversation with Glen Burton Ake?

A Yes, Sheriff Stedman asked me to go back upstairs and ask Mr. Ake if he wanted to make a complaint, or if he wanted to talk about what they had talked about the previous night. I went back up and asked him.

Q You went back up and asked Mr. Ake?

A Yes.

Q And, what did Mr. Ake say?

A He said it was what they talked about the previous night. He had some things he wanted to get off his chest.

* * *

[p. 511]

[TESTIMONY OF D.L. STEDMAN (IN CHAMBERS)]

Q Okay. What was he like at that time?
A I saw nothing wrong with him.
Q Okay. Was he—

[p. 512]

A He was coherent, and knew what was going on, and wanted to talk to us.
Q Okay.
A In fact, he told us that he had some stuff on his mind he wanted to get off his chest.

* * *

[p. 516]

Q How did you take this statement? Was it—did you take it on a tape, and then it was transcribed, and gone back and he read it, and signed it, is that correct?
A Yes, Sir. If you will notice looking at the statement, there are several places there where he corrected it, and initialed each correction that he made, and then signed it in front of a notary. This was done on the 26th day of November.

* * *

[p. 523]

[TESTIMONY OF GREG SHIELDS]

Q How did Mr. Ake act at that time?
A Competent.
Q Was he aware of where he was?
A Yes, he was.
Q Was he able to communicate with you?
A He was able to communicate clearly.
Q How was his action and demeanor?
A At that time he was very calm. As I said, he communicated well, willing to talk with us.
Q Did he know what was going on around him?

A Yes, he did.
Q Did he know why he was being held in custody?
A Yes, sir, he did.
Q Did you subsequent to advising him of his rights, ask him whether or not—did he understand his rights?
A Yes, he did.

* * *

[p. 524]

Q Okay. Approximately how long did it take to take that statement?
A Approximately two hours.
Q This is on the 23rd of November, is that correct?
A Yes, sir, Friday, the 23rd.
Q Subsequent to that time, was that statement reduced to writing?
A Yes, it was.
Q Did he sign that statement?
A Yes, he did. Also, initialed changes in the statement.
Q When did this take place?
A The statement was typed the following Monday. He would have initialed them Monday, the 26th.
Q Were you present when he signed and initialed it?
A Yes, I was.

* * *

[p. 528]

Q Okay. Now, during the course of this statement, did Mr. Ake ever act in a unrational manner?
A No, he did not.
Q Did he ever act incoherent?
A No, sir.
Q Did he ever make any wishes, or things during the statement that seemed highly unusual for a human being to be wishing?
A No, he did not.

* * *

[p. 536]

[TESTIMONY OF D.L. STEDMAN]

Q At the time of taking that statement from him, how did he appear? What was his demeanor and actions?

A I saw nothing unusual about his demeanor, or actions. He seemed responsive and alert to me.

Q Was he coherent?

A Yes, sir, he was.

Q Did he understand, in your opinion, where he was?

A Surprisingly so, considering what we knew about the case already, he told us things that were very parallel to them.

* * *

[p. 546]

A This is a copy of the statement—that portion of the statement which relates to the Douglass homicide, that was taken in my office on November the 23rd—the statement of Glen Burton Ake.

Q Was this his free and voluntary statement?

A Yes, sir, it was.

Q Was this statement signed?

A Yes, sir it was.

Q When was it signed?

A It was signed on November the 26th—

Q Do you know where?

A —1979. In my office.

Q Who was present?

A Myself, Greg Shields, Glen Burton Ake, and Carol Nichols.

Q At the signing of this statement, or confession, did Mr. Ake make any statement?

[p. 547]

A At the signing?

Q Yes, sir.

A Yes, sir.

Q What did he say?

A He was relating to a portion of the statement, when he made the statement, that he would like to get this all over with by Christmas.

Q Okay. Did he go over the statement?

A Yes, sir, he did.

Q Did he read the statement before he signed it again?

A Yes, sir, he did, and initaled changes that he made while he was reading the statment.

Q Did he change some things?

A Yes, sir he did.

Q What type of things did he change?

A Typographical errors that he caught.

Q He was able to catch some typographical errors?

A Yes, Sir.

Q Okay. Go ahead, sir.

A One of the aliases that he told us that he used was changed from one sentence to another. He felt that it was better in the next sentence than it was in the previous sentence. There was a—as I recall, I would have to go through and find it, there was a town misspelled. The town LaHoma was misspelled by, (Spelling) H-O-L-M-A, and he changed that to (Spelling) [p. 548] L-A-H-O-M-A.

Q He was able to read—this statement was how many pages?

A Forty-four.

Q He read it completely at that time?

A Yes, sir.

Q He was able to make changes through there, such as this?

A Yes, sir.

Q He seemed aware of what was going on then?

A Very much so.

Q And, he did sign it, is that correct?

A Yes, sir.

Q What name did he sign with?

A He signed his full name, Glen Burton Ake.

Q Was this notarized?

A Yes, sir, it was.

* * *

[p. 553]

[OPENING STATEMENT FOR THE DEFENSE]

MR. BREWER: Ladies and gentlemen, at this time it is phase two of the trial, which is the—you might say defense, or second part, which is called the defense case in chief. At this time it is our responsibility to call witnesses on behalf of the defendant.

At this point in time I will tell you exactly what the witnesses are and who they will be. We have three psychiatrists, Dr. Allan, Dr. Enos, and Dr. Garcia who is the mental health director—Dr. Garcia, of Eastern State Hospital, in Vinita, who works for the State of Oklahoma.

Now, what we intend to do is to put the doctors on. Dr. Allan was contacted by the Court—Judge Martin, on the Court's own feeling to contact and bring a psychiatrist in to discuss the mental condition of our client Glen Burton Ake. And, the doctor did so. And, he will relate to you just exactly what his psychiatric findings were at that period of time when he interviewed Glen Ake.

Second, of a sanity hearing with Dr. Allan and Dr. Garcia, and they are going to tell you of their interviews with Glen [p. 554] Ake, and their medical findings of the defendant at that period of time. And, subsequently he was committed to Eastern State Hospital, and was examined by the staff down there. Dr. Garcia being the head of that, is going to come forth and is going to testify to you as to his medical findings during his period of incarceration at the Vinita Mental Health Hospital.

And, that ladies and gentlemen, is the primary crux of the entire situation that we are trying to show you. The mental condition, which is a pertinent part of any trial of this defendant. Solely to your benefit. Solely for your evaluation, and solely to help you decide this case.

And, with that we will start—go ahead and put our witnesses on so you can get—consider it. Thank you very much.

THE COURT: All right. Do you want to call your first witness?

MR. BREWER: Call Dr. Allan.

THE COURT: Dr. Allan. Stand here and raise your right hand.

(Witness is sworn.)

DR. WILLIAM ALLAN,

called as a witness for the Defendant, having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q Would you state your name for the Court and jury, [p. 555] please sir?

A Dr. William Allan.

Q And, Dr. Allan, how are you so employed, sir?

A I'm in the private practice of psychiatry.

* * *

[p. 556]

Q Thank you, doctor. Now, doctor, have you ever had an occasion to come in contact with an individual known by the name of Glen Burton Ake?

A Yes, I have.

Q And, where did this contact take place?

A I saw him in the jail—I believe it is the City Jail here, on February 22nd, of this year. And, then I later saw him in the courtroom, on April 10th.

* * *

[p. 557]

Q Would you relate to the ladies and gentlemen of the jury, the findings during that evaluation, please?

A I saw him in his cell for approximately one hour, and at the conclusion of that, I thought that he was probably a paranoid schizophrenic. The reason I was asked to see him, was to determine—to provide evidence for the Court to determine if he were competent to stand trial. That is, did he have a mental defect, and did he also not understand the charges, and couldn't cooperate with counsel. My conclusion to that—what evidence I could say about that was, that I wasn't sure, and therefore recommended that he—recommend to the Court that he be sent to a State Hospital for 60 days observation.

Q Have you reviewed reports from the doctors at Central State—or, at East Central State Hospital—or, excuse me, Eastern State Hospital, Dr. Garcia, relating to Mr. Ake's mental condition?

A Yes, I talked with Dr. Garcia at the time of the sanity hearing, April 10th. I talked with him by phone, primarily.

Q And, did that reinforce any of your findings, or feelings at the time you interviewed Mr. Ake?

A You mean, my previous—Yes.

Q All right. Now, doctor, during your evaluation of Mr. Ake, would you relate to us some of the things that came out that caused you to feel that there was a possibility that Mr. Ake was a paranoid schizophrenic?

[p. 558]

A Yeah, he was a very difficult person to interview, chiefly because he wouldn't talk very much, and stared, and became angry and furious with me. He was obsessed, he wouldn't talk about much else voluntarily, except the Bible. He was studying that intensively. He doesn't have that much formal book learning. And, I was able to talk to him about the Bible, and then tried to get him back to talking about himself. In that he showed some very unusual religious ideas. And, in my opinion would be delusional. One example is that he is, I think ,literally the sword of vengeance. and, I forget the verse in the Bible that he showed me to verify that. And, then he sat—or, he stood on the left-hand side of God, Jesus on the right. Jesus is love, and he is vengeance. So, he talked to me about those things, I think, in a very odd way. He also talked about could he cooperate—did he know the nature of the charges against him, could he cooperate with counsel? He nodded to me that he—when I repeated the charges to him, that—I was trying to get him to make statements. You know, to say, in a careful way. So, I thought that he was nodding assent. He said that he would cooperate with Mr. Strubhar, and Mr. Brewer, because they were Christians. This is in contrast to his belief about the Court—Judge Martin, and everybody in court and jail as being sinners. Later when I tried to get him to say "would he cooperate with the counsel", he became furious at me. And, at that time said he wouldn't. So, he is contradictory on that.

[p. 559]

Q Let me ask you this, doctor. Were you able to ascertain when the beginning symptoms of paranoid schizophrenic started? Are you able to go back in time when you talked with him, to a particular time in his life when you say this mental situation was started, please, sir?

A Well, I'm not sure about that. This is the interview in the jail we are talking to, and there he did tell me that he talked with Jesus directly, and I'm not sure if Jesus talked with him.. I don't remember that. But, he talked with Jesus at 7 years of age, after his dad had beaten him, I think, pretty badly for smoking.

Q Now, were you able to find out, in his pattern of growing up, any childhood situations that would tend to create this condition that he now has—say, run away from home, or something of this sort, or mistreatment of some kind?

A Yeah, he has stated that he has been abused by his father. In that interview he said that—he was talking about how vengeance is necessary. And, without making a conscious connection, his next statements were about his parents, and that they were sinners, and they would be punished, and the nephew wouldn't be. He was too young to be sinful. That's in the interview. Remember, that's the jail interview. Now, there was also a sanity court hearing.

Q And, when was that held?

A That was on April 10th.

[p. 560]

Q Would you relate to us your findings—did you then, on April 10th, did you then have an opportunity to talk with and see the defendant Glen Burton Ake again on that day?

A Yes, in the court.

Q Okay. Would you relate to us again what you found, and what your findings were at that period of time, please, sir?

A At that time I thought I could state more definitely that he had a mental illness, both from seeing him directly,

and also getting the reports from Dr. Garcia. In terms of the history, the mother in the court—closed court, gave—answered questions, gave a history of him, and essentially said that he had a—from her viewpoint, a normal childhood. That as a teenager he had been a discipline problem, had been rebellious and had been a runaway.

Q All right. Now, doctor, on your findings, your discussion with other doctors in the area of psychiatry, people that have interviewed Mr. Ake, did you have any medical opinion on the mental condition of Glen Burton Ake?

A Well, I certainly do as to, you know, February 22nd and April 10th, that he was mentally ill at those times. I also have seen a report from Dr. Garcia that says he is still mentally ill, but that's not my direct knowledge.

Q Can a man be controlled, doctor, on medications? Mental problems be controlled with medication?

A Yes, they can certainly be controlled.

[p. 561]

Q Now, if you are under control on medication, does that indicate that you are medically cured, or do you still—

A That's a hard quesetion to answer. Not necessarily that you are cured, but some people with schizophrenia essentially are cured.

Q Doctor, what is Tri-thorazine?

A Thorazine is one thing, are you—

Q Okay. Thorazine, right. This word right here (indicating).

A Yeah, Thorazine is a standard major tranquilizer, or an antipsychotic drug. It is of a group called Phenathiazines. It think it is, (spelling) P-H-E-N-A-T-H-I-A-Z-I-N-E.

Q What does that do, stabilize the condition, or something of that order?

A Yes.

Q And failure to take that medicine thus will revert back to—

A Very often failure to take the medicine causes people to become mentally ill again, yes.

Q Okay. Now, doctor, in your professional opinion, and your evaluation, would you classify Glen Burton Ake is a mentally ill person?

A At the times I saw him, yes, sir.

Q Thank you, sir.

* * *

[CROSS EXAMINATION]

[p. 563]

Q * * * And, the term "insanity" actually is not a psychiatric term. It is a medical term, isn't it?

A At one point it was. It is a legal term essentially.

Q It is a legal term, yes, sir. And, what you were visiting with about with Mr. Brewer were medical terms, were they not—mental illness?

A Yes, I saw him for two—on two occasion, for really two separate legal purposes. First was to get evidence to present to the Court as to his competency to stand trial. So, I have to ask questions that bear on the legal question on that. Secondly then, after the court had found him not competent to stand trial, they had a civil hearing. And, I was asked to speak to the civil commitment requirements—"Did he have a mental illness?", and "Was he dangerous?" And, I spoke to those two. Now, we are still on a third legal question, as I understand it.

Q What was your conclusion as to whether he is dangerous?

A That he was very dangerous.

Q Doctor, your test at the time of your interview—or, at the jail, again at the time of the sanity hearing in February, or April, was your test to ascertain whether he knew right from wrong?

A No, it was not.

Q It was whether he had a mental illness, is that correct?

[p. 564]

A Yeah, I spelled out, I think, very specifically. In the first time was "Did he have a mental illness?", and two, "Did he understand the charges against him?", and "Could he cooperate with counsel?" And, then on the second time, "Did he have a mental illness?", and "Was he dangerous?"

And, in neither case did I specifically go into detail, try to get answers as to his ability to know right from wrong at the time of the alleged act.

Q So, that was not your concern, is that correct?

A That's right.

* * *

[p. 566]

Q One further question. And, do I understand from your testimony, sir—or, let me ask you, as a result of our findings in April 1980, you are not attempting to determine whether the defendant was mentally sane—the legal term, in October, or November of 1979, are you sir?

A That's right.

* * *

[REDIRECT EXAMINATION]

Q Doctor, with—in light of your interviews and consultation with Mr. Ake, did you state that the possibility of this illness that he has been suffering from could possibly date back to age 7?

A Yes, sir.

Q Is that a possibility?

A That's a possibility.

Q So, if that possibility—hypothetically, was correct, then on the days in question, this illness could also still be apparent then too, is that not correct?

A That's another possibility.

* * *

[p. 569]

RECROSS EXAMINATION

QUESTIONS BY MR. GOERKE:

Q These periods that you made this conclusion, or at least based upon the information that you have, would not relate to his status as being—knowing right from wrong back in October or November of 1979. You are not prepared to have an opinion as to that, are you?

A I have stated I do not have an opinion, medical—you know, to a medical certainty about that.

Q Right. In addition to which, even on those occasions in February and April, you are not prepared to say even then whether he knew right from wrong, but simply that he had a mental illness, is that correct, sir?

A I think so, overall. Now, one of the questions—

MR. GOERKE: That's fine. Thank you sir.

REDIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q Would you go ahead and finish what you are saying, doctor?

A Okay. Now, in asking him about, "Did he understand the nature of the charges against him?", he would nod, "Yes." He really didn't accept the authority of any earthling, court, or government, or person. So, if that speaks to his knowledge of right and wrong as of February 22nd, I don't have a firm approval, but I think you should know that. That he did not [p. 570] accept Judge Martin, or anybody's authority at that time.

* * *

MR. GOERKE: May we approach the bench?

MR. BREWER: (Out of the hearing of the jury) At this [p. 571] time I need to talk to him just a second before I put him on.

MR. GOERKE: (Out of the hearing of the jury) If it please the Court, comes now the State, we move this witness' testimony be stricken, and jury admonished to disregard it, because—The State would move that this witness' testimony be stricken from the record and jury admonished to disregard it, no relevancy established. He has no opinion as to the time of the crime, nor the time of the statement. We kept stressing October, November—he has no opinion as to his mental status at that time, as far as the legal term "insanity", which is the true question.

THE COURT: (Out of the hearing of the jury) All right. That motion will be overruled.

* * *

[p. 572]

DR. JACK P. ENOS,

called as a witness for the defendant, having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q State your name for the Court and jury, please?

A Jack P. Enos, M.D.

Q Now, doctor, what is your profession?

A General Practice of Medicine.

Q All right. Now, doctor, do you do any work in psychiatry

A Some. I have some interest in it.

Q Would you relate to us your background in medicine and psychiatry for us, please.

A I practiced in Yukon for 29 years. The last ten years I have been taking an ongoing course in psychiatry for general medicine.

[p. 573]

Q Have you ever served on any sanity board, or anything for the county, and things of this nature?

A Yes, sir.

Q Doctor, call your attention to April 10th, 1980, did you have an opportunity to come in contact with an individual by the name of Glen Burton Ake?

A Yes, I did.

Q And, what was the relationship of that contact, please?

A The sanity commission had been impanelled, two doctors and a lawyer. I happened to be one of the two doctors.

Q Now, doctor, at that time at the sanity hearing, did you have an opportunity to view and talk with Glen Ake?

A I had an oportunity, yes.

Q And, tell us something about that conversation, and things that occurred at the sanity hearing, please, sir?

A Well, it was essentially onesided, very little input on the part of Mr. Ake. Some that he did not feel inclined, or

necessary to talk to us, since he talked on a different plane than we talked on.

Q Did he mention talking to God, and things of this nature?

A Briefly, that was the only person whom he really communicated.

Q Did you have an opportunity to review any medical documents, any reports prior to this hearing?

[p. 574]

A Yes, we had Dr. Garcia's report, and we had Dr. Allan's report from a previous examination in the jail here.

Q Now, combined with your own interview with the defendant Glen Ake, and review of these medical reports, at the sanity hearing did you come up with a medical opinion as to the competency, or the mental state of Glen Ake?

A Yes, uh-huh, we felt and so stated that he was mentally ill.

Q Mentally ill?

A Right.

Q Okay, sir. Now, have you reviewed any reports from Dr. Garcia regarding Glen Ake, and medication that—known as Thorazine?

A I have.

Q Now, doctor, you are aware that Glen Ake is taking 200 milligrams of Thorazine—if you gave it to me right now, what would occur?

MR. GOERKE: If it please the Court, I don't [p. 575] believe this is really the proper form of a hypothetical question, if that's what he is attempting to ask.

MR. BREWER: I'll rearrange it.

Q (By Mr. Brewer:) Take a considered normal individual, give him 200 milligrams of Thorazine, and what are the reactions going to be?

A Most people will become extremely drowsy.

Q And, what about 200 milligrams, three times a day, what would that do to him?

A I think they become three times as drowsy.

Q Would it put them asleep, or put them to a point that they are—

A This is my opinion of the average person.

Q Do you have any medical opinion of the mental condition of Glen Ake?

A Yes, I do.

Q How would you classify Glen Ake at this time, to the best of your knowledge and medical beliefs?

A To the best of my knowledge and belief, I think this man is paranoid schizophrenic.

Q You consider him to be mentally ill?

A I certainly do.

MR. BREWER: No further question.

THE COURT: Mr. Goerke, cross examination?

[p. 576]

CROSS EXAMINATION

QUESTIONS BY MR. GOERKE:

Q Dr. Enos, that was your opinion on April 10th, 1980?

A It was.

Q And, it is your opinion today?

A Yes, sir.

Q All right, sir. If I might ask, how long did you observe him on April 10th?

A Well, I would estimate the whole hearing consummed not more than thirty minutes.

Q How many times have you consulted him prior to that, or observed him?

A Never.

Q How many times since then?

A Never.

Q You reached your opinion though—and, what is the mental disorder, the exact mental disorder that you pinpointed that is recognized by DSM?

A The one I gave, I think would come nearest fitting the category, schizophrenia, chronic paranoid type.

Q This is the same book that says "mental illness" is worrying about your job, or worrying about your marriage?

A Right. It starts out that way.

Q What were the pivotal facts giving rise to that diagnosis on April 10th?

[p. 577]

A Mainly the reports available to me by a trained psychiatrist, as well as—

Q Actually, you say "reports". Those were just letters, were they not? Were they Dr. Allan's—

A I wouldn't argue this, right. Written publications, written documents.

Q Right, a letter recommending that he be committed for observation, that he couldn't reach any conclusion. Wasn't that Dr. Allan's "report"?

A Probably. I wouldn't argue the point. He certainly said he couldn't make some statements.

Q Right. Did you have the advantage of some psychological tests? Let me ask you, did you have the advantage of an MMPI?

A I did not.

Q Did you have the advantage of a House/Tree/Person test?

A No.

Q Thematic Apperception Test?

A No, sir. I am familiar with all of these, but none—

Q Porteus Maze Test?

A No.

Q Bender-Gestault Test?

A No.

Q Wechsler Adult Intelligence Test?

A No.

[p. 578]

Q Graham-Kandall Test?

A No.

Q Shipley-Hartford Test?

MR. BREWER: We will object Judge. He has already testified he didn't give him any tests, if the Court please.

THE COURT: Yeah, I'll—I think—was your testimony you gave no tests?

THE WITNESS: Correct.

Q (By Mr. Goerke:) No psychological tests?

A No, no psychological tests.

Q Did you give any—let me ask you, was your diagnosis functional or organic?

A I really couldn't state that with a certainty.

Q Well, those are the two—

A Yeah, I really think it is organic, and I probably should elaborate.

Q All right, sir.

A That the medicine—

Q Let me ask you, did you have a benefit of any physiological tests, such as an x-ray, or electroencephalogram, pneumoencephalogram?

A No.

Q Neurological exam?

A Not unless they were included in Dr. Garcia's report. I don't remember whether a neurological may or may not have [p. 579] been included.

Q But, you didn't rely on that?

A No, I wasn't expected to show anything.

Q So, you didn't have the benefit of any psychological tests, nor any physiological tests to reach your cnclusion?

A I hate to say none.

Q Did you have the benefit of a clinical interview?

A We had the opportunity—

Q Did you conduct one?

A We had the opportunity.

Q Did you conduct a clinical—

A Did I ask him questions? Yes.

Q During that thirty minute observation period?

A Right.

Q Did you have any benefit of, or any awarenss of any previous mental or medical history?

A Had testimony from his mother, and others.

Q But, nothing documented?

A By word of mouth.

Q Did you consult with any of these former co-workers?

A No.

Q Friends?

A No.

Q Police officers?

A I don't believe any officers testified at the time. [p. 580] I do not remember if they did.

Q Did you read any police reports with regard to these charges?

A No, I did not.

Q Consult any witnesses?

A No, I did not.

Q So, you are really basing your opinion on a thirty minute period?

A Plus the reports that were available to me, yes.

Q Sir, plus what?

A Plus the reports which were available to me at that time, from reputable people.

Q Those were really letters now, weren't they?

A All right, letters.

Q I think they might be in evidence. Would you like to—would you agree, or would you like to look at them?

A I see no need to look at them. I agree they are letters, if that's the question.

Q And, as to Dr. Dr. Allan's, I believe was just a recommendation that he be committed for a 60 day period so he could be observed, wasn't that it? It was impossible to—

A Yes, in the brief period of time, correct, that he had observed him.

Q And, certainly what you are talking about—let me say first, or ask you if you will concede that insanity is a [p. 581] legal term, and not a medical term?

A I think insanity is in the hazy, or in between, neither lawyers and doctors are sure.

Q You think insanity is a medical term?

A I really don't know. I really dont know. I'm sure there is a legal definition of it. I'm sure there is a medical definition.

Q Let me ask you, is insanity—appear any place in DSM-1, 2, or 3?

A Not "insanity".

Q No, sir.

A Right.

Q But, those—the DSM's contain mental illnesses?

A Absolutely.

Q Then mental illnesses are medical terms?
A I might say, the various forms of insanity, if you wish.
Q Insanity, per se, is a legal term.
A Okay.
Q Then your examinations, or your conclusions are not whether he knew right from wrong?
A No.
Q And, certainly wouldn't relate to the months of October—
A Not at all.

[p. 582]

Q —or November 1979, as to whether he knew right from wrong?
A That's correct.

* * *

[p. 584]

Q Is there any place, in any report you have ever seen, or anything you have had the benefit to review, that has said "this defendant was legally insane in October or November of 1979"?
A No, sir.
Q Do you have any opinion as to whether—
A No, sir.

[p. 585]

MR. GOERKE: Thank you, sir.

REDIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q Doctor, in light of what you know, and all of the reports that you have read, then if you received a report—you know, where you said that he possesses paranoid schizophrenia, and he should be examined, and stuff like that in your report; you get a report back that says that he is under 200 milligrams of Thorazine, three times a day, would that still support your earlier findings that the man was mentally sick?
A I think it would.
Q Pardon me, sir?

A I think it would.
MR. BREWER: Thank you. No further questions.

RECROSS EXAMINATION

QUESTIONS BY MR. GOERKE:

Q Would that tend to change your opinion as to whether he was legally insane in October or November 1979?
A No, it would not.
MR. GOERKE: Thank you sir.

* * *

[p. 586]

DR. R.D. GARCIA,

called as a witness for the Defendant, having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q How are you, doctor? Would you state your name for the Court and jury, please?
A My name is R.D. Garcia, M.D.
Q Dr. Garcia, how are you employed?
A I'm employed at the Eastern State Hospital, at Vinita, Oklahoma, as a psychiatrist.
Q All right. Now, that is a State Hospital, is that not correct?
A Yes, sir.

* * *

[p. 588]

Q Now, let me call your attention to an individual by the name of Glen Burton Ake. Have you had an opportunity to evaluate and to medically check Glen Burton Ake as—
A Yes, sir.
Q And, where did this transpire?
A This transpired at the Eastern State Hospital, Vinita.
Q For a period covering how many days?
A During the first court ordered admission, that took place March 6th, 1980 to April 6th, 1980, and then he was sent back there for psychiatric care and treatment on April 10th, four days later, 1980, for two months, until June 9, 1980.

* * *

[p. 589]

Q Okay. Now, doctor, according to the 1st day of April, 1980, in your medical opinion, you state in this letter that Glen Ake is mentally ill, is that correct, sir?

A Yes, sir.

Q Okay. Now, for the ladies and gentlemen of the jury, would you please go through your treatment with Glen Ake, and please explain to us the testing, the facts that you considered in determining his mental capacity, and things of this nature, if you would, please, doctor?

[p. 590]

A Yes, sir. First of all we have to have all the various kinds of testing, in order to eliminate physical or organic illness, in the form of laboratory tests consisting of complete blood count, urinalysis, chest x-rays, skull x-ray, EEG, and also during the time of undertaking all these examinations and psychological examinations performed by our psychologist. And, during this period of observation, we obsered him day and night, pertaining to his mood, behavior, and mental capacity. And, from the very beginning we obviously detected some symptoms and signs of mental illness, consisting of suspiciousness, hallucinations, hearing voices, hearing things, believing himself to be a blue angel. And, on the other hand too, he reported to us about the use and abuse of various drugs that are mostly of the hallucinogenic variety. And, also of the excessive intake of alcohol. So, at first we thought it may be a toxic condition brought about, or associated with a drug that he had taken. We had a question about he may be acting out, or malingering. And, a thorough psychological testing revealed that the malingering spell is not there. It is a true sign of mental illness, because of the various sensitive testing, and in the psychological testing. and, also my clinical evaluation, we had ruled out the malingering spell. So, therefore, after we completed all of these examinations, being seen by the treatment team and medical staff, which I am presiding on that, composed of various doctors, psychologists, social worker, nurse, we decided that he needs [p. 591] psychiatric care and treatment. So, when he came back I immediately started him on tranquilizing medication. This treatment consisted of this Thorazine, which is a tranquilizer, which when taken in high dose, for a normal individual may produce high sedation and hypnotic effect. Not only the calming tranquilizing effect, but in order to eliminate the symptoms of psychosis of mental illness. But, for—the therapeutic dose consists of a high dose of Thorazine, up until we maintain a maintenance dose of 200 milligrams, three times a day, that he must continue. This is done in order to prevent a relapse of mental condition. Our diagnostic impression beginning was that of psychosis associated with drug, and on poison intoxication with alcoholism, and a variety of dependence on drugs which are unspecified, and unspecific. The other diagnose that we had was that of a schizophrenia, paranoid type. And, he showed signs of delusions—paranoid delusion, hallucinations, and so forth, and so on. Within a month following treatment he was showing mental progress. The fortunate thing about it, he never did show any violent, combative, assault, or destructive tendency then. And, he was not cooperative in the beginning, refusing the medication perhaps, and then later on he continued to take it. And, when he—especially when he is improved halfway, he realized that he needs the medication, and he had continued to take it. No incident, or anything that we have to do for him, with regards to his so-called potentially violent or dangerous behavior. Then [p. 591] we sent him back to the court declaring him competent to face trial, and that took place when he left Eastern State Hospital on June 9th, of this year.

Q All right. Now, doctor, medically speaking, would you still classify Glen Ake as mentally ill?

Q He still would be classified mentally ill, but in remission. In other words, in terms of the symptoms with medication as a follow-up. What I mean to say, if we tried to discontinue his current medication that he is taking now, he might become overtly ill again.

Q All right. Now, you will have to—I'm in kind of an awkward position, you might kind of guide me a little bit. An individual who is paranoid psychotic—okay? That is

taking hallucinogenic drugs, consuming a large quantity of alcohol—okay? Given the combination, would the reaction that you say in your evaluation of Glen Burton Ake, at that point in time, and under those conditions, would an individual be able to distinguish right from wrong?

A If that's true, I would consider him unable to do so.

Q Unable to know, or to—

A The basic difference between right or wrong—the legal way.

Q He wouldn't know—

A But, not necessarily considering him legally insane, in a way like knowing right from wrong, because a mentally ill [p. 593] individual, they still know some basic difference between right and wrong.

Q But, under that situation then, through the consumption of alcohol, hallucinogenic drugs, and paranoid schizophrenia, there is a possibility that it would render a person unable to distinguish right from wrong, am I saying that correctly?

A That's correct, sir.

Q All right, sir.

A Absolutely.

Q So, given a hypothetical situation, on a given date, at a given time, a paranoid schizophrenic drinks a lot of alcohol, and takes hallucinogenic drugs, he could then commit an act that he does not know, or is not responsible for, is that not correct, sir?

A It is a possibility.

Q All right. Now, doctor, so I can understand, the jury can understand, what tests—I don't have a list of all those names. There is a whole bunch of tests you give people, you know, when you do them. Did you give him a bunch of tests, and things of this order?

A Quite a bit of testing with regard to his emotional condition, family life, history of mental illness, treatment in the past, tests whether he was basically just a plain antisocial, or malingering individual—hardly not. These tests were all undertaken. In the IQ test, in the beginning he failed to score [p. 594] a normal level of IQ, because of the

severe disorganized thinking process, that he was not able to follow through the questions and answers. One, I had the impression that he may be a mild mentally retarded individual through the test, but then these wre all invalidated because of the severity of the illness at this time. And, later testing indicated that he had a normal/dull, or dull/ average intellectual performance.

Q Now, at that point in time, with all your testing, you totally and completely, if I understand it, eliminated the fact that Mr. Ake was malingering, or was trying to fool you, is that correct?

A Yes, sir, later on.

Q He was not acting?

A In my personal opinion, he was not acting at the time.

Q As an MD and psychiatrist?

A After completing all the examinations that we had gathered.

Q Okay. While you were interviewing him, working with him, tell the ladies and gentlemen some of the thinking process, or some of the wierd things that you came in contact with, that you thought were unusual?

A The first place, he mentioned about he did not remember much of the incidents, and persistently telling that he belongs to the blue angel—, he talks to God, and a lot of religious erratic type behavior and thinking. And, that is [p. 595] what brought ought the fact that he may be just malingering, but then he persistently told us about—and, if he would be pushed farther, he would become hostile and a little restless, and then he would refuse to talk—that was from the beginning. But, later on he continued to say that his experience came off and on already for the last one year. And, we even questioned the fact why he did not seek any psychiatric help at that time. To him, those experiences were realistic. He thought he was even some kind of a special assignment from God Almighty, that he is one of the angels. And, not considering his religious background that he had before, it was such an exaggerated type of thinking. And, also his emotional upkeep was that of a withdrawn individual. That he did not socialize, or talk to anybody, preferred to stay in his room. And, while being

observed in his room, he just stared into space, and at times moving his lips and nothing that we could understand what he was talking about. That went on, and on, and on until the time that he came back when we started treatment—the medication that we have given.

Q All right. Now, doctor, I don't—I have—it might appear awkward, bear with me, but Glen Ake is a paranoid schizophrenic, being treated with Thorazine, 200 milligrams, three times a day, to maintain some stability, is that not correct?

A Yes, sir.

[p. 594]

Q But, he is not cured from being mentally ill, is he?

A No, sir.

Q Quits taking the medicine and there is a possibility he will revert back to the same type of delusions of—on a special assignment from the Lord as the blue angel, is that correct?

A that's correct.

Q Could reappear, all right. Now, doctor, had you been hired and paid money by the defense to come here and testify?

A No, sir.

Q And, you don't work for the defense, do you, sir?

A No, sir.

MR. BREWER: No further questions. Thank you very much, doctor.

THE WITNESS; You're welcome.

THE COURT: Cross examination?

CROSS EXAMINATION

QUESTIONS BY MR. JAMES:

Q Dr. Garcia, when did you first receive Glen Burton Ake?

A We received Mr. Ake March 6, 1980.

Q For what purpose did you receive him?

A For the purpose of psychiatric determination, or observation and testing, in order to determine whether he was insane, or not.

Q Incompetent to aid in his defense?

A Yes, sir.

[p. 597]

Q Okay. Not legally insane as knowing right from wrong, but just incompetent to aid in his defense, is that correct?

A Yes, sir.

Q Was there any call at that time for a diagnosis as to October or November 1979?
Were you looking into that?

A No, sir. We were unable to assess him during that—those months.

* * *

[p. 602]

Q Have you done any testing, or evaluation of Glen Burton Ake as towards legal insanity at the time of the commission of the offense?

A No, sir, we were not able to.

Q Do you have any opinion as to Glen Burton Ake's mental insanity at the time of the offense—October or November?

A No, I would not say. I have a personal opinion.

Q Do you have no opinion hen that you can—professional opinion? You have done no testing?

A Professionally, no, sir.

* * *

[p. 604]

Q Doctor, did you do any tests to determine whether the person that is seated here, Glen Burton Ake, was mentally insane at the time of this incident?

A No, sir, we were not able to.

Q Okay. You have no opinion—

A Make any examination.

Q And, you have no opinion as to that, is that true?

A No, sir.

* * *

[REDIRECT EXAMINATION]

[p. 606]

Q Now, here is the question—a hypothetical situation. Take an oil field worker, a hard worker, a paranoid schizophrenic, on drugs, hallucenogenics, alcohol, gets involved in a violent crime. Is there a possibility that that man at that point in time, under those conditions, could not distinguish the difference between right and wrong, on a special assignment from God?

A Sure, that's a possibility.

MR. BREWER No further questions.

THE COURT: Any more gentlemen?

MR. JAMES: Yes, Your Honor.

RECROSS EXAMINATION

QUESTIONS BY MR. JAMES:

A But, doctor, there is a difference between knowing right from wrong, and mental illness, is that correct?

A Yes, sir.

Q And, do you have any opinion as to whether Glen Burton Ake knew right from wrong in October and November of '79?

A No, sir, I don't have any opinion.

* * *

[p. 607]

MR. GOERKE: (Out of the hearing of the jury) At this point the State would move that this witness' testimony be stricken from the record, and jury admonished to disregard it, as it is not relevant to this trial.

THE COURT: (Out of the hearing of the jury) Okay. I'll overrule that.

* * *

[p. 608]

MR. BREWER: (Out of the hearing of the jury) Comes now defense counsel and informs the Court that due to the uncooperative nature of the defendant, and the lack of communication between defense counsel, defense counsel at this time is unable to put the defendant on the witness

stand, or to determine whether or not he in fact wants to execute his Constitutional right to testify in his behalf. And, based upon that, we are going to have to rest. We cannot get a yes or no if he wants to take a stand, so we rest.

MR. GOERKE: (Out of the hearing of the jury) Based upon that only? Based upon that only, you rest?

MR. BREWER: (Out of the hearing of the jury) Yes, sir.

* * *

[p. 672]

[CLOSING ARGUMENT FOR THE PROSECUTION]

You know, before we start talking about the only defense that counsel argues, that of insanity, I think we should stop and just reconsider the definitions that we received from the [p. 673] psychiatrists yesterday, from the Judge in his Instructions today. Do you remember my persistence in asking, for instance, Dr. Allan, "Do you have an opinion as to whether he knew right from wrong at the time—during October and November of 1979?

* * *

[p. 675]

So, bearing in mind we are looking at a test of knowing right from wrong on October 15, 1979, or November when the statement was made, realizing the consequences of those acts. is there a probable—a reasonable doubt created? None of the doctors had any opinion. Remember? Each one was distinctly asked, "Do you have an opinion as to whether the defendant knew right from wrong in October and November, 1979?" None of them did.

* * *

[p. 679]

And, bearing in mind, no psychiatrist has testified here during this trial, has ever had an opinion as to whether he knew right from wrong at the time of the crime—even at the time he was committed, and came back, where he sits there today.

Mr. Brewer says, "That won't happen. They won't just turn him loose." The Judge has taken care of that in Instruction 12A—read that. Send him to a mental institution—well, we [p. 680] have been there. They sent him April 10th. They sent him back June 9th, and said he is still mentally ill, but he is ready to go back. He is sedated. If we hadn't had these charges pending, he would have gone out on the street a free man.

MR. BREWER: I'll object to that, if the Court please.

THE COURT: Overruled.

MR. GOERKE: If the charges hadn't been pending on June 9th, he would have gone back out on the street.

IN THE DISTRICT COURT IN AND
FOR CANADIAN COUNTY, OKLAHOMA

EXCERPTS FROM JURY INSTRUCTIONS
JUNE 26, 1980
[CAPTION OMITTED IN PRINTING]

No: 10

You are instructed that an insane person is not responsible criminally for his acts committed when such mental condition existed. The test of criminal responsibility for acts, which would ordinarily be criminal under the law, is:

The mental ability or capacity to distinguish between right and wrong as applied to the particular act, and to understand the nature and probable consequences of such act, that is to say, the capacity to know right from wrong, and to know then that the particular act, alleged to have been committed, was wrong.

No: 12

The defendant as a part of his defense contends, in effect, that if he did in fact commit the crimes charged in the Informations, then he was in a state of insanity at the time.

In this connection you are instructed that under the laws of this State an act done by a person temporarily or partially deprived beyond a reasonable doubt, before the jury would be justified in convicting the defendant.

You are therefore instructed that if, after considering all the evidence in this case, you believe beyond a reasonable doubt that the defendant committed the acts charged in the Informations and that at that time the defendant knew the nature and consequences of his acts and knew that they were wrong, and was able to distinguish between right and wrong as applied to said acts, then in that event you would not be justified in acquitting him by reason of insanity.

On the other hand, if, after considering all of the evidence in the cases, you entertain a reasonable doubt as to whether the defendant was mentally competent to understand the nature and consequences of his acts, to distinguish between right and wrong as applied to said acts, and

to know that they were wrong, then in that event it is your duty to resolve that doubt in the defendant's favor and acquit him on the ground of insanity, and state that fact in your verdicts.

No: 12A

You are further instructed that if the defendant is acquitted on the grounds that he was insane at the time of the commission of the crimes charged and if the Court has reasonable grounds to believe that the defendant is presently mentally ill and that the of reason, upon proof that at the time of committing the act charged against him such person was incapable of knowing its wrongfulness, cannot be punished as a public offense.

The law presumes every person to be sane and able to distinguish right from wrong as applied to any particular act and to understand the nature and consequences of such act, until a reasonable doubt of his sanity is raised by competent evidence. It is an essential ingredient of a crime that a person, to be guilty of such crime, must have at the time of its commission sufficient mental capacity and reason to enable him to distinguish between right and wrong as applied to the particular act that he is then about to do. It is essential, further, that such person know and understand the nature and consequences of his act and that he know that if he does commit such act he will do wrong and subject himself to punishment.

You are further instructed in this regard that when the plea of insanity is interposed, the burden of proof is on the defendant to introduce sufficient evidence to raise in the minds of the jury a reasonable doubt of the defendant's sanity at the time of the commission of the acts in question. It is not required that the defendant shall prove such insanity to the satisfaction of the jury beyond a reasonable doubt. It is sufficient if he only introduces sufficient evidence to raise in the minds of the jury a reasonable doubt of his sanity at the time of the acts, and when this is done the burden of proof is on the State to prove the sanity of the defendant by competent evidence, release of the defendant would be dangerous to the public peace or safety, in that event the Dis-

trict Attorney shall forthwith prepare, sign and file a petition for the commitment of the defendant. Determination of such alleged mental illness, commitment and discharge shall be made pursuant to the procedure set forth in the Oklahoma Mental Health Law.

IN THE DISTRICT COURT IN AND
FOR CANADIAN COUNTY, OKLAHOMA

[JURY VERDICTS (JUNE 26, 1980)]
[CAPTIONS OMITTED IN PRINTING]

We, the Jury empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, find the Defendant, Glen Burton Ake, Guilty of the crime of MURDER IN THE FIRST DEGREE.

/s/ Dale Regier,
Foreman

We, the Jury empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, find the Defendant, Glen Burton Ake, Guilty of the crime of Shooting with Intent to Kill, and assess his punishment at Five Hundred (500) years imprisonment.

/s/ Dale Regier,
Foreman

We, the Jury empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, find the following statutory aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

1. (x) The murder was especially heinous, atrocious, or cruel;
2. (x) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
3. (x) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

/s/ Dale Regier
Foreman

We, the Jury empanelled and sworn to try the issues in the above entitled cause, do, upon our oaths, having heretofore found the defendant, Glen Burton Ake, Guilty of the crime of MURDER IN THE FIRST DEGREE, fix his punishment at death.

/s/ Dale Regier
Foreman

IN THE DISTRICT COURT IN AND
FOR CANADIAN COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, PLAINTIFF,

vs.

GLEN BURTON AKE, ALSO KNOWN AS
JOHNNY VANDENOVER, DEFENDANT.

No. CRF-79-303

JUDGMENT AND SENTENCE

Filed July 28, 1980

NOW, on this 25th day of July, 1980, the same being one of the regular judicial days of the District Court of Canadian County, State of Oklahoma, this cause comes on for hearing Defendant's Motion for New Trial and for Judgment and Sentence, and the defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, being present in person and by his counsel, J. Malone Brewer, and the State of Oklahoma being represented by Earl E. Goerke, District Attorney, and Bill James, Assistant District Attorney, Canadian County, State of Oklahoma, and the said defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, having been duly presented and arraigned and having pleaded "Not Guilty" to the offense of MURDER IN THE FIRST DEGREE, as charged in the Information filed herein, having been duly and regularly tried and convicted of said offense in Canadian County, State of Oklahoma, and said Motion for New Trial having been duly presented and argued and the Court, after taking the same under consideration, and being fully advised in the premises finds: That said Motion for New Trial should be overruled.

THEREFORE, it is the JUDGMENT OF THE COURT that the defendant's Motion for New Trial be, and the same is hereby overruled to which ruling of the court defendant excepts and exceptions allowed.

THEREUPON, defendant having been asked by the Court whether he had any legal cause to show why Judgment and Sentence should not be pronounced against him,

in conforming with the verdict of the jury and the defendant giving no good reason why Judgment and Sentence should not be pronounced and none appearing to the Court;

THE COURT DOES HEREBY ADJUDGE AND SENTENCE the defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, the punishment by death for the offense of MURDER IN THE FIRST DEGREE in conformity with the verdict of the jury.

IT IS THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that said defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, be conveyed from the bar of this Court to the County Jail of Canadian County, State of Oklahoma, and within ten (10) days thereafter, by D.L. Stedman, Sheriff of Canadian County, State of Oklahoma, transported to the Lexington Assesment and Reception Center, Department of Corrections located at Lexington, Oklahoma, where the warden of said reception center is directed to receive said defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, and cause him to be confined in the center until necessary admission and reception procedures have been accomplished, and thereafter, within thirty (30) days after receiving said defendant, said warden of said center is further directed to cause defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, to be transported and delivered to the Warden of the Oklahoma State Penitentiary at McAlester, Oklahoma.

IT IS FURTHER ORDERED AND DIRECTED that the warden of the State Penitentiary at McAlester, Oklahoma, shall receive, hold and confine said GLEN BURTON AKE, also known as JOHNNY VANDENOVER, until the 10th day of October, 1980, on which date, the warden of the place of incarceration herein designated is commanded to put the said GLEN BURTON AKE, also known as JOHNNY VANDENOVER, to death, within the walls of the State Penitentiary at McAlester, Oklahoma, by continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed

physician according to accepted standards of medical practice, or in any other manner that may be designated by the laws of the State of Oklahoma, in all respects as provided by the law for such execution; and the Clerk of this Court is commanded to deliver to said Sheriff of Canadian County, State of Oklahoma, a certified copy of this Judgment and Sentence, together with the Death Warrant which will be sufficient warrant and authority to said sheriff of Canadian County, State of Oklahoma, and to the Warden of the Lexington Center and to the Warden of the State Penitentiary for the execution of the Judgment and Sentence as herein provided, and each of said officials is commanded to make return of the proceedings had and held in the execution of this sentence and that such return be filed as provided by law.

THEREUPON, the Court notified the defendant of his absolute right to appeal from this Judgment and Sentence to the Court of Criminal Appeals of the State of Oklahoma, and further that such right would be provided whether he had sufficient funds to pay therefor or not. The Court further informed the defendant that provisions were made for an automatic appeal and directed that transcript of the proceedings herein be made and provided to the Oklahoma Court of Criminal Appeals, as required by Statute, to which Judgment and Sentence the defendant did duly except at the time and counsel for defendant gave oral notice in open court of his intent to appeal.

IT IS THEREFORE the judgment and order of the Court that the defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, be allowed, and is hereby granted the time allowed by law in which to make, prepare and serve the transcript herein, to all which proceedings, the defendant, GLEN BURTON AKE, also known as JOHNNY VANDENOVER, excepted and exceptions allowed.

/s/ James D. Bednar

JAMES D. BEDNAR, *Associate District Judge*

ATTEST:
/s/ Clyde Gene Miller

CLYDE GENE MILLER, *Court Clerk*
Canadian County, State of Oklahoma

(SEAL)

COURT OF CRIMINAL APPEALS OF OKLAHOMA

GLEN BURTON AKE, A/K/A JOHNNY VANDENOVER,
APPELLANT,

v.

THE STATE OF OKLAHOMA, APPELLEE.
No. F-80-523

April 12, 1983

An appeal from the District court of Canadian County; James D. Bednar, Judge.

Glen Burton Ake, a/k/a Johnny Vandenover, appellant, was convicted of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill in the District Court of Canadian County, Oklahoma, Case Nos. CRF-79-302, CRF-79-303, CRF-79-304, CRF-79-305. He was sentenced to death for each murder count and to 500 years' imprisonment for each shooting with intent to kill count, and appeals. AFFIRMED.

Richard D. Strubhar, Reta M. Strubhar, Yukon, for appellant.

Jan Eric Cartwright, Atty. Gen., Chief, Appellate Crim. Div., Oklahoma City, for appellee.

OPINION

The appellant, Glen Burton Ake, also known as Johnny Vandenover, was convicted by a jury in Canadian County, Oklahoma, of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill. He was sentenced to death for each of the murder charges, and sentenced to a five-hundred year prison term for each of the shooting with intent to kill counts. He has perfected a timely appeal to this Court.

On the evening of October 15, 1979, in search of a suitable house to burgle, the appellant and his accomplice, Steven Keith Hatch, a/k/a Steven Lisenbee, drove their borrowed car to the rural home of Reverend and Mrs. Richard

Douglass. The appellant gained entrance into the Douglass' home under the pretense that he was lost and needed help finding his way. After an initial conversation with sixteen-year-old Brooks Douglass in the entrance way of the Douglass' home, the appellant returned to his car, supposedly to get a telephone number. The appellant thereupon re-entered the house and produced a firearm. He was joined shortly afterwards by his accomplice, who also was armed.

The appellant and his accomplice ransacked the Douglass' home as they held the family at gunpoint. They bound and gagged Reverend Douglass, Mrs. Douglass and Brooks Douglass, and forced them to lie in the living room floor.

The two men then took turns attempting to rape twelve-year-old Leslie Douglass in a nearby bedroom. Having failed in their attempts, they bound and gagged Leslie, and forced her to lie in the living room floor with the other members of her family.

Throughout the episode, the appellant and his accomplice repeatedly threatened to kill all the members of the Douglass family, and covered their heads with articles of clothing as they lay helpless on the floor.

The appellant instructed his accomplice to go outside, turn the car around, and "listen for the sound." The accomplice left the house as he was told. The appellant then shot Reverend Douglass and Leslie each twice with a .357 magnum pistol, Mrs. Douglass once, and Brooks once; and fled.

Mrs. Douglass died almost immediately as a result of the gunshot wound. Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and drive to the nearby home of a doctor.

The appellant and his accomplice were apprehended in Colorado following a month-long crime spree which took them through Arkansas, Louisiana, Texas, and much of the Western half of the United States.

Subsequent to their extradition to Oklahoma, Leslie Douglass identified the appellant in a lineup. The appellant confessed to the shootings.

The error first alleged by the appellant is that the trial court wrongfully refused to grant a change of venue. He argues the pre-trial publicity concerning the crime and events occurring subsequent thereto, including the fact that the appellant's accomplice had earlier been found guilty of the crimes at issue and sentenced to death, was of such an extent as to bias the community against him, thereby denying him the benefit of an impartial jury.

The appellant failed to comply with the statutory procedure for change of venue mandated by 22 O.S.1981, § 561. The motion was not verified by affidavit, nor was it supported by the affidavits of at least three credible persons residing within the county. Thus, the motion not having been properly before the trial court, is likewise not properly before this Court. See *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); *Bruton v. State*, 521 P.2d 1382 (Okl.Cr. 1974); *Adams v. State*, 25 Okl. Cr. 298, 220 P. 59 (1923). The motion was properly overruled.[1]

[1] The murder/shootings of the Douglass family attracted a significant amount of media attention in Oklahoma. Most, if not all, of the jurors in this case had been exposed to various forms of media accounts of the crimes and the events subsequent thereto. The appellant attempts to bolster his contention with the results of a poll conducted on behalf of his accomplice and himself, which indicated that forty-four percent of those surveyed believed the appellant to be guilty prior to his trial. Additionally, the appellant has provided this Court with a copy of an advertisement used by the Sheriff of Canadian County in his bid for re-election, which depicts the handcuffed appellant being escorted by that sheriff. The caption of the picture was, "Quality law enforcement takes a tough, dedicated professional—let's keep Lynn Stedman Sheriff."

It is not necessary that a juror be completely ignorant of the facts and circumstances surrounding a case. It is sufficient if the juror can disregard his/her own opinion and render a verdict based on the evidence presented. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Russell v. State*, 528 P.2d 336 (Okl.Cr.1974). In this case, after extensive examination by counsel for both sides, each juror stated he/she could do so.

In addition, we note that the trial court did not rule on the motion to change venue until completion of the voir dire to determine the extent of the bias, if any, that existed in the minds of the veniremen. The appellant was afforded wide latitude in examination of the veniremen. This procedure afforded the appellant ample time to weed out unsatisfactory or biased jurors. Moreover, the appellant waived his last two preemptory challenges. Having done so, he cannot complain of juror bias on appeal. *Carpitcher v. State*, 586 P.2d 75 (Okl. Cr.1978).

The appellant next alleges that the trial court erred by not granting a second preliminary hearing in this case. The appellant's preliminary hearing was held conjointly with his accomplice on January 21, 1980. He was ejected from his February 14, 1980, arraignment for disruptive behavior. One week later, the judge who presided at the arraignment, on his own motion, ordered the appellant to undergo psychiatric evaluation. On April 10, 1980, a special sanity hearing was held at which the appellant was found to be mentally ill and ordered committed to Eastern State Mental Hospital for observation and treatment. He was subsequently adjudged competent to stand trial, and the proceedings against him reinstated on May 27, 1980.

The appellant filed a motion requesting a second preliminary hearing. He argued that he was unable to assist his attorneys at the January 21, 1980, preliminary hearing because of his lack of competency. The motion was overruled.

The appellant announced ready at the preliminary hearing. No attempt was made to raise the issue of his ability to assist counsel. We cannot presume, absent any supporting evidence, that the appellant was incompetent at that time. A review of the transcript of the preliminary hearing reveals that the appellant did indeed profit from the preliminary hearing. Counsel for the appellant thoroughly and adequately cross-examined witnesses offered by the State. He raised the issue through cross-examination of the appellant's state of mind during the criminal episode, and challenged one of the surviving victims' identification of the appellant as the man who shot him. The appellant also put on witnesses and obtained copies of police and medical reports.[2]

[2] In regard to this matter, we note that the appellant focuses his argument in this allegation of error upon a statement made by the judge while denying the motion. At one point, the judge stated, "It [the preliminary hearing] is not designed as a deposition-type hearing for the defendant to make a great deal of discovery." Although the language of *Beaird v. Ramey*, 456 P.2d 587 (Okl.Cr.1969), reveals the erroneous flavor of the judge's statement, we find it to be of little consequence.

The appellant failed to preserve the issue in the motion for a new trial. Had any error concurred, it was thereby waived. *Stevenson v. State*, 637 P.2d 878 (Okl.Cr. 1981).

In addition, the appellant has not shown he was prejudiced at trial by the failure to grant the second preliminary hearing. There was no fundamental error. We conclude that the judge did not abuse his discretion.

The appellant alleges in his next assignment of error that a prospective juror was dismissed in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).[3]

We find no error in this matter. The form and substance of the questions were very similar to those we approved in *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980); and the answers given by the juror indisputably satisfy the Witherspoon concerns. See, 88 S.Ct, at 1777 n. 21.

As demonstrated in the text, the preliminary hearing did in fact work as a discovery device for the appellant.

Additionally, we note that the judge did not base his ruling solely on this factor. Thus, the appellant's argument, while possessing some merit, gains him nothing.

[3] The appellant's argument revolves around the following dialogue excerpted from the record:

> THE COURT: This is a case in which the State of Oklahoma is seeking the death penalty, and I will ask you this question. In a case where the law and the evidence warrant, in a proper case, could you without doing violence to your conscience agree to a verdict imposing the death penalty?
> MRS. WOLFE: No, sir, I could not.
> THE COURT: All right. Let me ask you this. Knowing that the law provides for the death penalty in certain proper cases, and knowing that the State will ask you to bring back a verdict of death in this case, and considering your reservations about the death penalty, do you have such conscientious opinions as would prevent you from making an impartial decision as to whether the defendant is guilty or not guilty?
> MRS. WOLFE: Sir, I could not impose the death penalty on anyone.
> THE COURT: All right. I need to ask you one other question. If you found beyond a reasonable doubt that the defendant was guilty of Murder in the First Degree, and if under the evidence, facts, and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the death penalty such that regardless of the law, the facts, and circumstances of the case, you still would not consider fairly the imposition of the death penalty?
> MRS. WOLFE: No, Sir.

In addition, the appellant did not examine the prospective juror, did not object when she was excused, and did not preserve the error in the motion for a new trial. Thus, had any error occurred, it was waived. *Hays v. State*, 617 P.2d 223 (Okl. Cr.1980).

The appellant's ninth assignment of error is that he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist and a court-appointed investigator as incident to his constitutional rights to effective assistance of counsel and availability of compulsory process for obtaining witnesses.

We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes. *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); and cases cited therein.

In addition, the argument was not preserved in the motion for new trial. It was thereby waived. *Hawkins v. State*, 569 P.2d 490 (Okl.Cr.1977).

The appellant's next two allegations of error concern the fact that he was sustained on 600 milligrams of Thorazine per day throughout his trial. The medication was administered pursuant to the orders of the doctors who treated him at Eastern State Hospital at Vinita. Dr. R.D. Garcia informed Judge Martin (who was originally to preside over the case) by letter dated May 22, 1980, that the appellant was competent to stand trial, and could assist his attorney, provided he continue taking the prescribed medication.

The appellant remained mute throughout the trial. He refused to converse with his attorneys, and stared straight ahead during both stages of the proceedings. He argues that, because of the effect of the Thorazine, he was not actually present at his trial; and thereby denied his statutory and constitutional rights. Secondly, he argues that, due to his conduct at trial, the trial court should have halted the proceedings and impaneled a jury to evaluate his present sanity.

Both of these issues boil down to the question of whether the thorazine medication rendered him unable to understand the proceedings against thim and affected his ability to assist counsel. *(Okl.Cr.1981)*.

Dr. Garcia testified that he had diagnosed the appellant's condition as schizophrenia of the paranoid type, which necessitated maintenance on the Thorazine to stabilize his personality. Dr. Garcia further testified that, although the dosage of Thorazine which the appellant was taking would sedate a normal individual, it had a theraputic effect of eliminating the symptoms of the appellant's condition. Without the benefit of the medication, the appellant could revert to a violent and dangerous state.

In the letter to Judge Martin, referred to above, Dr. Garcia stated the appellant, with the benefit of medication, was competent to stand trial and assist his attorneys in his defense. The appellant remained on his prescribed medication, and there is no evidence that any change in his competency occurred in the month between his release from Vinita and his trial. Thus, we have no reason to believe the appellant's behavior was caused by any factor other than his own volition.[4]

The appellant additionally asserts that, according to *Peters v. State*, 516 P.2d 1372 (Okl.Cr.1973), the trial court was under a duty to first cite the appellant for contempt of court, and, secondly to bind and gag him before allowing the use of drugs to sedate him through his trial. This argument misconstrues the purpose behind the medication given the appellant. The appellant's disruptive behavior at his preliminary hearing gave rise to the proceedings which eventually led to his commitment at Vinita and ensuing treatment with Thorazine. However, even though the treatment indirectly resulted from the appellant's misbe-

[4] It is quite possible that the defense of insanity interposed by the appellant fostered such behavior on his part. Nonetheless, the injury was well aware of the fact that the appellant was being maintained on the Thorazine. The appellant was present throughout the trial, and his demeanor was readily discernable by the jurors. Notwithstanding the appellant's "abnormal" behavior at trial, the jury determined that he was sane.

havior, the Thorazine was not administered to him for the sole purpose of rendering him sufficiently tranquil to facilitate progress of the criminal proceedings instituted against him. Thus, the appellant's reliance on *Peters* is misplaced.

Likewise, we disagree with the contention that the appellant should have been treated as an insane person, incapable of standing trial, because of the necessity of Thorazine treatment to "normalize" him. Psychopharmaceutical restoration of persons to a state of normality is not an uncommon practice in modern society. If a defendant may be rendered competent to assist in his defense through the use of medication, it is in the best interests of justice to afford him a speedy trial. See, *State v. Stacy*, 556 S.W.2d 552 (Tenn. Cr. 1977); and cases cited therein. See also, *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (1976).[5]

Concerning the trial court's failure to impanel a jury to determine the present sanity of the appellant, we note initially that the appellant's attorneys voluntarily withdrew the motion for trial on present sanity because the appellant had just been returned from Vinita, certified as competent to stand trial. Since the motion was withdrawn, the court obviously had no occasion to rule on it. We cannot say that the court was under a duty to raise the issue *sua sponte*. In light of the facts that the appellant had been released from Vinita one month before, certified as competent to stand trial, and that he was maintaining his medication; the trial court had no good reason to order a trial on the appellant's present sanity. Although the appellant's refusal to communicate with his attorneys was brought to the attention ofthe trial judge, and although the appellant's demeanor was observable, it does not necessarily follow that the trial court was bound to deduce from such behavior that another hearing was needed.

[5] One notable case contra to our holding is *State v. Maryott*, 6 Wash. App. 96, 492 P.2d 239 (1971), wherein it was held that a defendant was improperly tried while being maintained on medication. The defendant in that case stared vacantly ahead throughout the trial as did the appellant in this case. It must be noted, however, that the defendant in that case was taking a combination of several drugs, all of which were known to be strong depressants with notable side effects.

According to the statute authorizing trials on present sanity, a doubt must arise as to the defendant's sanity. 22 O.S.1981, § 1162. The doubt referred to in the statute has been interpreted to be doubt which must arise in the trial court's mind after an evaluation of the facts, information concerning the defendant's insanity and motive. *Beck v. State*, supra. *Reynolds v. State*, 575 P.2d 628 (Okl.Cr.1978); *Russell v. State*, supra. The existence of doubt of the defendant's sanity must arise from facts and circumstances of a substantial character. There must be reason to believe that the defendant's claim of insanity is genuine and not simulated to delay justice. *Bingham v. State*, 82 Okl.Cr. 5, 165 P.2d 646 (1946); *Laslovich v. State*, 377 P.2d 977 (Okl.Cr.1963). The appellant's demeanor was but one factor to consider in light of the facts and circumstances in this case. We cannot say the judge abused his discretion in failing to order a trial on present sanity. *Reynolds*, supra; *Beck*, supra.

Initially, the appellant argues he was insane when he made the confession, thus it was involuntary. However, the appellant failed to establish any doubt of his sanity at the time the crime was committed. The sheriff who took the confession testified the appellant understood his rights, and voluntarily waived them. The confession was lucid and detailed. The appellant read the lengthy typewritten copy of the confession, corrected spelling errors and filled in missing details. Lastly, although the appellant was adjudged incompetent to stand trial approximately five months after the crime was committed, none of the psychologists who examined him could offer an opinion of the state of the appellant's mental condition prior to the time they observed him.

We are of the opinion the confession was knowingly and voluntarily given. See, *Wadkins v. State*, 572 P.2d 998 (Okl.Cr. 1977).

The appellant's second allegation concerning the confession stems from the fact that the trial court deleted parts of the confession, because it contained information of other crimes committed by the appellant and his accomplice subsequent to the Douglass shootings. The deleted confession contained blank spaces and blank pages. The appellant

maintains that the confession, in its deleted form, was prejudicial.

This allegation of error was not preserved in the motion for new trial. It has thus not been properly preserved for appeal. *Turman v. State*, 522 P.2d 247 (Okl.Cr.1974). In addition, we do not agree that the appellant was prejudiced by the form of the confession.

In the appellant's fifth assignment of error, he argues that numerous photographs were unduly prejudicial and should not have been admitted into evidence. A review of both the trial transcript and the exhibits before us in the record reveals that all but one of the photographs complained of were indeed excluded by the trial court pursuant to the appellant's objection. The photograph which was admitted over the appellant's objections portrayed the nature in which one of the victim's feet were bound. The photograph served to demonstrate how the appellant in this case rendered his victim helpless before he brutally murdered him. The photograph was not gruesome, and did not unfairly prejudice the appellant. The trial court did not abuse its discretion in admitting the picture. *Holloway v. State*, 602 P.2d 218 (Okl.Cr.1979).

Next, the appellant alleges the trial court erred by allowing Brooks and Leslie Douglass, the two surviving victims, to testify concerning the appellant and his cohort's attempt to rape Leslie. He traditional argues that the trial court erroneously failed to instruct the jury concerning the alleged other crimes.

The appellant failed to object to the testimony of which he now complains. Additionally, he failed to include it in the motion for new trial. The appellant has completely failed to bring the error, if any, to the attention of the trial court. As we stated in *Burks v. State*, 594 P.2d 771 (Okl. Cr.1979), it is incumbent upon the defense attorney to raise an objection to the introduction of evidence of other crimes, lest the error be waived.

In addition, we hold that the admission of the testimony and the trial court's failure to give a limiting instruction was harmless. The evidence presented against the appellant in both stages of the trial was overwhelming. We are

convinced that the jury would have rendered the same verdict and imposed the same sentences had the evidence not been presented, or had the instruction been given. *Burks* supra; Luman v. State, 626 P.2d 869 (Okl.Cr.1981).

The appellant's twelfth and thirteenth allegations are that the prosecutor impassioned the jury with improper arguments in both stages of the trial.

The prosecutor stated numerous times in the closing argument of the first stage that there was "no doubt" the appellant was guilty. The prosecutor was permissibly arguing the State's conclusions based upon the evidence in the case. *Williams v. State*, 557 P.2d 920 (Okl.Cr.1976). In addition, the authority cited by the appellant in support of his argument are clearly inapplicable. See, *Evans v. State*, 546 P.2d 284 (Okl.Cr.1976) (wherein the prosecutor stated, "And I think you'll return a verdict of guilty because that's what I think he is.").

The prosecutor in this case also stated that, "If we hadn't had these charges pending, he [the appellant] would have gone out on the street a free man." The statement was made in response to the appellant's argument that,if found to be insane, he would not be "turned loose." The prosecutor argued that the appellant had been sent to a mental hospital, treated and released. Thus, the gist of the prosecutor's argument was that the appellant would be, in effect, set free if found to be insane.

Although the prosecutor would have been better advised not to make such an argument, we do not find it of such magnitude to mandate modification or reversal. *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980). The Jury was properly instructed concerning the consequences of an innocent by reason of insanity verdict. In addition, the evidence against the appellant was so over-whelming that it is inconceivable the verdict was based solely on such a remark. *Chaney*, supra.

The appellant additionally complains of remarks made by the prosecutor during the second stage of the trial. The appellant admits in his brief that no objections were made. After careful examination of the record, we can find no error which rises to the level of fundamental error.

The appellant's tenth assignment of error concerns a note from the jury in which it was requested that the testimony of Dr. R.D. Garcia, a psychologist who testified for the defense, be repeated. The trial court declined to have a transcript of the testimony sent to the jury. The appellant alleges error on two grounds; first, that the jurors were not brought into open court for consideration of the note, pursuant to 22 O.S. 1981, § 894, and secondly that Dr. Garcia's testimony was not read to the jury.

The appellant failed to object to the jury's absence during the court's discussion of the note. In addition, he failed to properly preserve the argument for appeal in the motion for new trial. Nonetheless, we note that the trial court replied to the jury's request in writing, and that counsel for both sides were given opportunity to object to both the form and substance of the note. As we stated in *Boyd v. State*, 572 P.2d 276 (Okl.Cr.1977), the purpose of 22 O.S.1981, § 894, is to prevent certain communications from being made outside of open court which might influence the jury when both parities have had a chance to be present to protect their interests. Thus, although the jury should have been returned to the courtroom pursuant to § 894, failure to do so here was harmless. *Boyd*, supra; see also, *Starr v. State*, 602 P.2d 1046 (Okl.Cr.1979).

In response to the appellant's second argument that the jury should have been allowed to rehear Dr. Garcia's testimony, we note that the decision to allow or disallow the jury's request lies within the discretion of the trial court. *James v. State*, 456 P.2d 610 (Okl.Cr.1969). The appellant contends that, as evidenced by the "choppy record," it was difficult for the jury to understand Dr. Garcia's testimony. We cannot agree with the appellant's assessment of the nature of Dr. Garcia's transcribed testimony. From the record before us, we have no reason to believe that the jury did not hear and understand Dr. Garcia's testimony as it was given in court. Accordingly, we decline to hold that the trial court abused its discretion. *Jones*, supra.

The appellant next alleges that the lack of air conditioning in the courthouse in which the trial and jury deliberations were conducted forced the jury to return the ver-

dict without proper deliberation. The appellant has failed to cite, nor can we find, any evidence in the record to support such a contention. Although the courtroom may have been somewhat uncomfortable, there is no evidence that the jury failed to exercise utmost diligence in reaching its verdict. Indeed, upon having been given the opportunity to recess for the night, and wait until the following morning to begin deliberations in the second stage, the jury elected to remain and deliberate. The contention is clearly without merit.

In his fifteenth allegation of error, the appellant maintains that the verdict was against the clear weight of the evidence. He argues the jury should have returned a verdict of not guilty by reason of insanity.

In every case there is an initial presumption of sanity. This presumption remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State. *Rogers v. State*, 634 P.2d 743 (Okl.Cr.19810; *Richardson v. State*, 569 P.2d 1018 (Okl.Cr.1977).

The appellant had no history of mental illness. When each of the three doctors who testified on behalf of the appellant was asked whether he had an opinion as to the appellant's ability to distinguish between right and wrong at the time of the shootings, each answered in the negative. They could only testify as to their opinions that the appellant was "mentally ill" several months after the crimes had occurred.

The appellant clearly failed to establish any reasonable doubt as to his sanity at the time the crimes were committed. The jury was properly instructed concerning the standard of sanity and the burden of proof. We cannot agree that the jury's verdict was against the weight of the evidence. *Rogers*, supra.

The appellant's eighteenth assignment of error is that the accumulation of errors alleged in the foregoing assignments of error mandates reversal in this case. We have held in the past that if a defendant's previous assignments of error are found to be without merit, the argument which asks that

those previous allegations be considered collectively is likewise without merit. *Brinlee v. State*, 543 P.2d 744 (Okl.Cr.1975); *Haney v. State*, 503 P.2d 909 (Okl.Cr.1972). Since we have found all of the appellant's allegations of error to be without merit, we find this argument meritless also.

The appellant's seventeenth allegation of error is that the felony-murder doctrine is unconstitutional. This allegation is not properly before this Court, as it was not preserved in the motion for new trial. *Turman v. State*, supra.

The appellant argues in his nineteenth assignment of error that the statutory scheme of 21 O.S.1981, § 701.11 unconstitutionally shifts the burden of proving mitigating circumstances onto defendants in capital cases after aggravating circumstances are proven by the State.

We note initially that the issue is not properly before this Court, because it was not preserved in the motion for new trial. *Turman v. State*, supra. Nonetheless, due to the nature of the contention, we shall consider it.

In support of his contention, the appellant cites *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In Re: Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Bauer v. State*, 3 Okl.Cr. 529, 107 P. 525 (1971); and *Pettigrew v. State*, 554 P.2d 1186 (Okl.Cr.1976). None of the authority cited supports the appellant's contention. These cases stand for the rule that a defendant in a criminal case cannot be constitutionally required to produce evidence to negate or mitigate the degree of a criminal charge against him. *Mullaney v. Wilbur*, supra.

In the present case, the statute in question addresses the nature of the punishment to be imposed *after* the determination of guilt has been made. Thus, the considerations relevant to the guilt determination espoused in the cases cited by the appellant are inapplicable. The appellant was not *required* to produce any evidence in support of mitigation at all. However, since he chose to have the jury consider factors which he hoped to justify his appeal for leniency, it was incumbent upon him to prove their existence. The defendant is in the best position to know of and present evi-

dence in mitigation. See, *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (Ariz.Sup.1978). To hold a defendant in a capital case to proof of mitigating circumstances in the sentencing stage of a bifurcated trial, should he so chose to raise them, is not contrary to the Due Process principle that the State must carry the burden of proving a defendant's guilt beyond a reasonable doubt. *Winship*, supra; *Mullaney*, supra; *Watson*, supra.

Lastly, we review the sentences imposed upon the appellant as mandated by 21 O.S.1981, § 701.13.

We are of the opinion that the sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor. Our discussion of the appellant's various allegations concerning this issue in the text of this opinion reveal that the appellant's sentences were imposed in accordance with the evidence presented, free from the taint of passion and prejudice. In addition, as previously discussed, the evidence against the appellant was overwhelming in both stages, and provide ample justification for the penalty imposed.

Likewise, we are of the opinion the evidence supports the finding of the aggravating circumstances justifying the imposition of the death penalty to be: 1) that the murder was especially heinous, atrocious or cruel; 2) that the murders were committed to avoid or prevent a lawful arrest or prosecution; and 3) that a probability existed that the appellant would commit criminal acts of violence that would constitute a continuing threat to society.

The appellant in this case invaded the sanctity of his victims' home, bound each one and forced them to lie in the floor. The appellant and his accomplice discussed killing the family, and made them promise not to call the police if allowed to live. Unheeded by Mrs. Douglass' plea for their lives, the appellant ruthlessly emptied a .357 magnum pistol into the bodies of the helpless victims before he fled their home. We believe the facts adequately support each of the three aggravating circumstances found by the jury.

Lastly, we find that the sentences of death are not excessive or disproportionate to those imposed in other cases.[6]

We have also compared this case to other capital cases which have been modified to life or reversed for other reasons.[7]

Having fully reviewed the record and arguments presented on appeal, we find no reason to interfere with the jury's decision. The judgments and sentences are AFFIRMED.

CORNISH and BRETT, JJ., concur.

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[6] *Smith v. State*, 659 P.2d 330, 54 OBAJ 452 (Okl.Cr.1983); *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982); *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982); *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980); *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.1980) (remanded for resentencing, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1); *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980).

[7] *Jones v. State*, 660 P.2d 634, 54 OBAJ 661 (Okl.Cr.1983); *Driskell v. State*, 659 P.2d 343, 54 OBAJ 460 (Okl.Cr.1983); *Boutwell v. State*, 659 P.2d 322, 54 OBAJ 402 (Okl.Cr.1983); *Munn v. State*, 658 P.2d 482, 54 OBAJ 402 (Okl.Cr.1983); *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982); *Hall v. State*, 650 P.2d 898 (Okl.Cr.1982); *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982); *Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982); *Franks v. State*, 636 P.2d 361 (Okl.Cr. 1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); *Hager v. State*, 612 P.2d 1369 (Okl.Cr.1980).

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

GLEN BURTON AKE, A/K/A/ JOHNNY VANDENOVER,
PETITIONER,

vs

THE STATE OF OKLAHOMA, RESPONDENT

No. F-80-523

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE FILED JUNE 15, 1983

NOW on this 15th day of June, 1983, after having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 15th day of June, 1983.

/s/ Hez J. Bussey

HEZ J. BUSSEY, *Presiding*

/s/ Tom R. Cornish

TOM R. CORNISH, *Judge*

/s/ Tom Brett

Tom Brett, *Judge*

ATTEST:
/s/ Ross N. Lillard J.
Clerk

In the Supreme Court of the United States

No. 83-5424

GLEN BURTON AKE, PETITIONER,

v.

OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of the State of Oklahoma.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 19, 1984